Supreme Court, U.S.
FILED

No. _____ 02 599 OCT 16 2002

CLERK

In The
Supreme Court of the United States

SHEILA FOSTER ANTHONY,
LISA FOSTER MOODY,

Petitioners,

v.

ALLAN J. FAVISH, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA) to photographs of the body of Vincent W. Foster, Jr., taken by the Park Police at the death scene shortly after he shot himself. Plaintiff asserts these photographs may demonstrate that the several investigations of Mr. Foster's death by the National Park Service, the FBI, Congressional Committees, and the Office of Independent Counsel -- all of which concluded that he took his own life -- were wrongfully conducted. Mr. Foster's widow and sister asserted a privacy interest, contending that release of the photographs will lead, among other things, to a repetition of the acute distress they experienced from widespread publication of a previously leaked photograph of Mr. Foster's dead hand holding the gun he used to commit suicide. Three questions are presented relating to FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), which protects law enforcement records when public disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy":

1. Whether the court of appeals correctly held that a FOIA requester need not offer evidence to support his assertion that release of law enforcement records is necessary to vindicate a public interest in determining whether there was government misconduct, and that, if the requester offers such evidence, the court does not have to weigh it.

2. Whether the court of appeals erred in ordering release of photographs without finding a nexus between the specific photographs and the public interest alleged to justify their release.

3. Whether the court of appeals correctly held that public release of law enforcement records that are not "graphic, explicit, and extremely upsetting" does not invade the survivors' privacy.

PARTIES TO THE PROCEEDING

Respondent Allen J. Favish brought this suit against the respondent Office of Independent Counsel. The petitioners, Sheila Foster Anthony and Lisa Foster Moody, intervened as defendants in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Sheila Foster Anthony and Lisa Foster Moody, sister and widow of the late Vincent W. Foster, Jr., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals on the first appeal (Pet. App. 8) are reported at Favish v. Office of Independent Counsel, 217 F.3d 1168 (9th Cir. 2000). The majority and dissenting opinions of the court of appeals on the second appeal (Pet. App. 1) are unreported. The order of the court of appeals denying petitions for rehearing, including the dissent of Judge Pregerson (Pet. App. 4), is unreported. The opinions of the district court (Pet. App. 5, 45) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 20, 2002. The court entered an order denying a timely petition for rehearing on August 16, 2002. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Freedom of Information Act ("FOIA") provides that:

> (b) This section does not apply to matters that are
>
> . . .
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
>
> . . .

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b).

STATEMENT

1. Vincent W. Foster, Jr., was Deputy White House Counsel under President Clinton. Mr. Foster was found dead in Fort Marcy Park, a national park in northern Virginia, on July 20, 1993. The National Park Service and the FBI conducted investigations into his death, and later inquiries were performed by separate committees of the Senate and House of Representatives. Two separate investigations into his death also were conducted by the Office of Independent Counsel, under Robert B. Fiske, Jr., and Kenneth W. Starr, respectively. See Favish, 217 F.3d at 1179-80, Pet. App. 27-31 (Pregerson, J. dissenting) (summarizing investigations). The latter inquiry took place over three years and involved "interviews with more than thirty witnesses and analysis of hundreds of documents, forensic reports, the physical evidence, and death-scene and autopsy photographs." Id. at 1180, Pet. App. 30. All these investigations independently concluded that Mr. Foster committed suicide by a self-inflicted gunshot wound.

Plaintiff, a lawyer and conspiracy theorist, is unpersuaded and asserts that the numerous professional investigators and public officials who have studied Mr. Foster's death are guilty of wrongful conduct. In 1997, Plaintiff made a request under FOIA for copies of 150 photographs compiled during the investigations. Following litigation (and plaintiff's withdrawal of his request for 21 photographs), he now possesses copies of 119 of the photographs identified in his original request. Id. at 1170-71, Pet. App. 10. Also, he has been granted access to an abundance of other investigative materials that provide great detail about Mr. Foster's death and the subsequent

investigations into it, including extensive, detailed information concerning the gunshot wound that caused Mr. Foster's death.

The ten remaining photographs, which were taken shortly after Mr. Foster's body was discovered, depict his corpse lying in Fort Marcy Park. Mr. Foster's widow and sister intervened in this case because they believe that release of these photographs would constitute a severe and unnecessary invasion of their family's privacy. By invading their memory of a loved one, by subjecting them to harassment from any number of media outlets, and by leaving them vulnerable to the unwitting viewing of profoundly traumatic images, the disclosure of these photographs clearly would implicate a privacy interest of their family. Disclosure of these photographs is precluded by 5 U.S.C. § 552(b)(7)(C), which permits government agencies to deny the release of investigatory materials where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Plaintiff also participated as counsel in a FOIA suit in the District of Columbia brought by an organization seeking photographs of Foster's body at the death scene and the autopsy, including the same photographs at issue here.[1] The D.C. Circuit affirmed the district court's ruling that plaintiff had not shown a sufficient public interest in disclosure to outweigh the Foster family's privacy interest in the photographs. Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120 (D.C. Cir. 1999).

3. Plaintiff brought this action in the Central District of California against the Office of Independent Counsel ("OIC"), seeking numerous photographs relating to Mr. Foster's suicide. The district court ordered disclosure of

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[1] The D.C. Circuit case involved black-and-white copies of the photographs. The present case involves color Polaroid originals. Favish, 217 F.3d at 1177, Pet. App. 24.

some photographs, but refused disclosure of photographs of the death scene that showed Mr. Foster's body or face. The court held that the compelling privacy interest implicated by these photographs outweighed any public interest in their disclosure. Pet. App. 45. The OIC had submitted a declaration of Mr. Foster's widow, recounting her "shock" at "seeing the [already-leaked] picture of Vince on the television with the gun in his hand," Pet. App. 59, and a declaration from his sister describing her "nightmares and heart-pounding insomnia" after seeing that photograph in national media and recounting her elderly mother's fear that she will see "photographs in the tabloids on the grocery store racks where she shops." Pet. App. 61.

Plaintiff appealed, and the panel reversed and remanded, directing the district court to examine the photographs in camera to weigh the privacy interests of the Foster family against the claimed public interest in disclosure. Favish, 217 F.3d 1174, Pet. App. 17. Judge Pregerson dissented in part, finding that the Vaughn index submitted by the OIC was sufficiently detailed to obviate the need for in camera review and that the compelling privacy interest possessed by the Foster family clearly outweighed any public interest in disclosure with respect to nine photographs of Mr. Foster's body and face, except as to the photographs of Mr. Foster's right hand clutching the gun he used to kill himself, which Judge Pregerson would release. Id. at 1186-87, Pet. App. 43-44.[2]

Plaintiff asserted that the photographs of Foster's face and body were needed to explain purported deficiencies and inconsistencies in the Starr Report concerning the nature and location of Mr. Foster's entrance and exit wounds --- deficiencies and inconsistencies that, plaintiff contended, supported his overall contention that the OIC's investigation was "grossly incomplete and untrustworthy."

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[2] The Vaughn index's description of the photographs appears at Favish, 217 F.3d at 1176-77, Pet. App. 22-23.

Id. at 1184, 1185-86, Pet. App. 39-42. Judge Pregerson rejected plaintiff's assertion, agreeing with the D.C. Circuit's conclusion that the claimed deficiencies and inconsistencies were not sufficient to establish a public interest in disclosure of the photographs that outweighed the Foster family's privacy interest. Favish, 217 F.3d at 1185-86, Pet. App. 41-43 (citing Accuracy in Media, 194 F.3d at 124). Judge Pregerson also concluded that in camera inspection was not needed, agreeing with the D.C. Circuit's observation that "we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic." Id. at 1177, Pet. App. 25 (quoting Accuracy in Media, 194 F.3d at 125).

In contrast, the Ninth Circuit majority stated that a FOIA requester is not required to have knowledge or evidence of agency misfeasance. Id. at 1172, Pet. App. 14. The court did note that plaintiff had offered evidence and arguments that the OIC had engaged in misfeasance in its investigation of Foster's death, but concluded that "it is not the function of the court in a FOIA proceeding to weigh such evidence or adjudicate such arguments." Id. at 1173, Pet. App. 14.

In this case the OIC had represented that the withheld photographs are "graphic, explicit, and extremely upsetting." Id. at 1174, Pet. App. 17. The court, however, concluded that this description "is not true of the photo already published in *Time* and on television, showing a hand holding a gun," adding that: "It may be true of the remaining 9 photos. But no court has ever seen them." Id. The court of appeals then directed the district court on remand to examine the photos and balance the public benefit to be obtained by their release against the effect on the privacy of the Foster family. Id.

4. On remand, the district court, observing that the panel decision limited the Foster family's privacy interest to "graphic, explicit, and extremely upsetting" material, concluded that five of the photographs fit this description

and therefore were precluded from disclosure under FOIA Exemption 7(C). 5 U.S.C. § 552(b)(7)(C). However, it granted disclosure with respect to the remaining five photographs that it found did not meet this test. Pet. App. 5. The district court made no finding as to how photographs that were not "graphic, explicit, and extremely upsetting" might nevertheless contain sufficient detail to elucidate the true nature of Mr. Foster's wounds and thus advance the alleged public interest.

Sheila Foster Anthony and Lisa Foster Moody then intervened as defendants, submitted additional declarations in support of their motion for reconsideration (Pet. App. 59, 61) and, when that motion was denied, joined in the OIC's appeal. Plaintiff also appealed.

After in camera review of the photographs, the panel summarily affirmed the district court's judgment, except as to one of the photographs that the district court had ordered released, which the panel concluded should be withheld. Judge Pregerson dissented, reiterating his position that nine of the photographs implicate a privacy interest that outweighs any interest that the public possesses in their release. Pet. App. 3.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision raises three issues under the FOIA privacy exemption, all of which have considerable national importance and are the subject of a Circuit conflict, including a conflict with the D.C. Circuit *as to the same photographs* of Mr. Foster's body at the death scene.

One issue is the preliminary showing a FOIA requester must make to demonstrate that public disclosure of law enforcement records implicating privacy concerns is needed to establish whether the agency involved engaged in improper conduct. The D.C. and Fourth Circuits have held that the requester must submit compelling evidence of governmental misconduct to warrant overriding privacy

interests implicated by such records; the Seventh and Tenth Circuits have taken similar positions. These decisions conflict with the holding of the Ninth Circuit in this case that the requester is not required to have knowledge or present evidence of agency misfeasance and that the court is not required to assess any evidence of agency misfeasance he may offer.

The second issue is whether the requester must show a nexus between the claimed public interest and the specific records sought. Other Circuits have insisted that such a nexus be found. The Ninth Circuit's failure to require such a nexus is particularly glaring in this case, because the claimed public interest focuses on alleged inconsistencies in different accounts of Mr. Foster's entrance and exit wounds. While the Ninth Circuit decided to release only photographs it found not to be "graphic, explicit, and extremely disturbing," it failed to explain how such photographs would resolve the alleged inconsistencies in various accounts of Mr. Foster's wounds, or otherwise have any nexus to the claimed public interest.

The third issue is whether law enforcement records must be "graphic, explicit, and extremely disturbing" to implicate privacy interests. The Ninth Circuit stands alone in its holding that records not meeting this test do not warrant privacy protection. The Ninth Circuit's decision conflicts with the D.C. Circuit, which accorded privacy protection under Exemption 7(C) to the same photographs that the Ninth Circuit has held must be released. The Ninth Circuit has cited nothing in the record or arguments before it to justify its disagreement with the D.C. Circuit over the same photographs. Moreover, other Circuits have adopted interpretations of the FOIA's privacy protection that preclude disclosure that would result in annoyance, embarrassment or harassment, even though the records would not meet the Ninth Circuit test.

The Foster family already has experienced acute distress associated with the previous release of a leaked

photograph showing Foster's dead hand holding the gun he used to shoot himself and the family reasonably fears similar consequences if the photographs involved in this case are released and widely distributed.[3] The family's privacy interest should not depend on whether the photographs are "graphic, explicit, and extremely disturbing."

These issues have assumed a particular importance in recent times, as the increasingly ubiquitous use of tape recordings and video cameras has led to increasingly frequent instances in which law enforcement agencies possess tapes containing oral or visual images of the immediate circumstances of violent death. Federal law enforcement agencies in possession of this kind of material need to know how to respond to requests for public disclosure, given the very real privacy concerns of surviving families. The conflict between the decision below and the D.C. Circuit's decision as to the same photographs underscores the need for uniform standards.[4]

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[3] Previous photographs released to plaintiff have appeared on his web site, which presently contains 13 photographs relating to the Foster death, including photographs of his car, his eyeglasses, and the gun involved. http://www.allanfavish.com/photoix.htm (visited August 19, 2002).

[4] On September 3, 2002, the United States filed a petition for certiorari in a case from the Seventh Circuit involving related but different aspects of FOIA Exemption 7(C). City of Chicago v. United States Dep't of Treasury, 287 F.3d 628 (7th Cir. 2002), petition for cert. filed (Sept. 3, 2002) (No. 02-322). That case and the present case offer an appropriate occasion for this Court to consider the scope of FOIA Exemption 7(C).

1. The Decision Below Conflicts with Four Other Circuits as to the Showing a FOIA Requester Must Make To Establish a Public Interest Sufficient to Override Privacy Concerns Implicated by Law Enforcement Records.

FOIA Exemption 7(C) permits federal law enforcement agencies to withhold public release of records where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In United State Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), this Court held that invasion of personal privacy may be "warranted" where disclosure of "[o]fficial information . . . sheds light on an agency's performance of its statutory duties." Id. at 773. Several Circuits have addressed the issue of the showing a FOIA requester must make under Reporters Committee to support an assertion that public disclosure of law enforcement records implicating privacy concerns is needed to shed light on the conduct of a federal law enforcement agency.

In finding that the public interest outweighed the Foster family's privacy interest, the Ninth Circuit concluded that a requester is not required to have knowledge or present evidence of agency misfeasance, and that if he tenders such evidence "it is not the function of the court in a FOIA proceeding to weigh such evidence or adjudicate such arguments." Favish, 217 F.3d at 1173, Pet. App. 14.

This test is manifestly different from the test adopted by the D.C. Circuit in deciding that the public interest did not demand disclosure of the same photographs at issue in the Ninth Circuit case. The D.C. Circuit concluded the Foster family's privacy interest in the photographs could be overcome only by "compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access . . . is necessary in order to confirm or refute that

evidence." Accuracy in Media, 194 F.3d at 124. Commenting on plaintiff's allegations of investigatory inconsistencies in assessment of the Foster death scene, the D.C. Circuit observed: "When multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification." Id. The D.C. Circuit concluded that "there is no persuasive evidence of [the falsification plaintiff alleged], much less compelling evidence." Id.

This Court, therefore, is confronted with the unique situation where two courts of appeals, dealing with the same factual situation, have reached totally opposite results by adopting two radically different rules of law.

In requiring compelling evidence of governmental misconduct, the D.C. Circuit followed a position it first enunciated in SafeCard Serv., Inc. v. SEC, 926 F.2d 1197, 1205-6 (D.C. Cir. 1991) that "unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [law enforcement records] is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant." At least three other circuits have taken the same or similar positions. Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (public interest in law enforcement records naming individual FBI agents, suspects and other persons interviewed is "negligible," "there being no compelling allegation of agency corruption or illegality"); Miller v. Bell, 661 F.2d 623, 630 (7th Cir. 1981) ("plaintiff's broad unsupported hints of a government coverup" are insufficient to overcome privacy interests implicated by law enforcement

records);[5] KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990) ("broad unsupported statement of possible neglect" in Postal Service investigation of shooting of postal workers insufficient to overcome privacy concerns). Cf. Halloran v. Veterans Admin., 874 F.2d 315, 323 (5th Cir. 1989) ("merely stating that [a public] interest exists in the abstract is not enough; rather, the court should . . . analyze[] how that interest would be served by compelling disclosure" of information implicating privacy interests); Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987)(R.B. Ginsburg, J.) (requester's "general interest in 'getting to the bottom' of" a controversy did not outweigh privacy interest in law enforcement records).

The position of the D.C. Circuit and other Circuits that require a searching judicial assessment of a FOIA requester's assertion of public interest is consistent with United States Dep't of State v. Ray, 502 U.S. 164, 179 (1991), which held that under FOIA Exemption 6 "[m]ere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy."

The Ninth Circuit stands alone in its interpretation, which could open the floodgates and expose vast amounts of law enforcement records implicating privacy concerns to public release without a showing of governmental misconduct.[6]

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[5] But see City of Chicago v. United States Dep't of Treasury, 287 F.3d 628, 637 (7th Cir. 2002), pet. for cert. filed, (Sept. 3, 2002) (No. 02-322).

[6] The potential consequences of the Ninth Circuit's decision are illustrated by Oguaju v. United States, 288 F.3d 448 (D.C. Cir. 2002), petition for cert. filed, (Aug. 2, 2002) (No. 02-5651), involving an inmate's FOIA request for the Marshal's Service file on another convict whose testimony helped secure his conviction. The requester argued that the file was necessary to show whether the government violated its Brady obligations. The D.C. Circuit, applying its SafeCard test, upheld denial of the request. The inmate has filed a petition for certiorari, claiming a conflict with the Ninth Circuit's decision on the Foster death scene photographs. Id.

2. The Decision Below Conflicts with Other Circuits in Failing to Require a Nexus Between the Alleged Public Interest and the Specific Documents Sought.

The majority opinion in the first appeal contains no finding concerning the nexus between the death scene photographs and the claimed public interest. It simply states that, if the requester seeks to know what "the government is up to," the requester needs to have no knowledge or to present evidence of agency misfeasance and, if he offers evidence and arguments on this issue, the court is not required to "weigh such evidence or adjudicate such arguments." Favish, 217 F.3d at 1173, Pet. App. 14. On remand, the district court proceeded to make only a determination as to whether the photographs were "graphic, explicit, and extremely disturbing," without making any determination as to the nexus between photographs that do not meet this test and the claimed public interest. Pet. App. 5. The Ninth Circuit's summary affirmance of the second appeal did not illuminate this issue. Pet. App. 1. Thus, this Court and others are left in the dark as to how photographs that are not "graphic, explicit, and extremely disturbing" could shed light on the alleged inadequacy of the Starr Report concerning the location of Mr. Foster's entrance and exit wounds.

In contrast, Judge Pregerson's dissent in the first appeal analyzes in detail plaintiff's contentions that disclosure of the death scene photographs would serve the public interest, concluding that, with one exception, the photographs would shed no light on any of the claimed inconsistencies in the Report. Favish, 217 F.3d at 1185, Pet. App. 40-41.[7] With respect to plaintiff's contention that the

[7] For example, Judge Pregerson points out that photographs of Mr. Foster's body at the death scene would shed no light on alleged inconsistent statements in the Starr Report concerning who was present at the autopsy. 217 F.3d at 1185, Pet. App. 40.

Starr Report failed to explain purported inconsistencies concerning the location of the entrance and exit wounds, Judge Pregerson, agreeing with the D.C. Circuit, concluded that these purported inconsistencies did not raise a sufficient issue to implicate the public interest and thus override the clear privacy invasion that release of such photographs would implicate. Id. at 1185-86, Pet. App. 41-43.

In failing to require a nexus between the photographs it ordered released and the alleged public interest, the decision of the court of appeals squarely conflicts with Senate of Puerto Rico, which held that Exemption 7(C) protected certain law enforcement records implicating privacy concerns despite an indisputable public interest in the investigation involved, because the requester "has not adequately supported its 'public interest' claim with respect to the *specific* information being withheld." 823 F.2d at 588 (emphasis in original). See also Kimberlin v. Dep't of Treasury, 774 F.2d 204, 208 (7th Cir. 1985) ("[t]he record fails to reflect any benefit which would accrue to the public from disclosure of this document . . . .").[8]

The Ninth Circuit's failure to require a nexus between the photographs it ordered released and the public interest has particular importance in this case. It is difficult to understand how any photograph "could both elucidate the true nature of Mr. Foster's wounds and yet not be disturbingly graphic." Accuracy in Media, 194 F.3d at 125. Because the Ninth Circuit limited its release to photographs it found to be *not* "graphic, explicit and extremely disturbing," the question is raised as to how such photographs could bear any nexus to the alleged public interest in the Starr Report's purported inconsistencies concerning Mr. Foster's wounds. The Ninth Circuit's failure to make any finding on this issue is not only at odds with the

[8] But see City of Chicago v. United States Dep't of Treasury, 287 F.3d at 637, supra.

case law, but also renders its decision virtually incomprehensible.

3. The Decision Below Conflicts with the D.C. Circuit's Decision on the Same Photographs and the Tests Applied by this Court and Other Circuits as to the Nature of Privacy Interests Needed to Protect Law Enforcement Records.

In its first decision, the court of appeals held that in camera inspection was necessary for the district court to determine whether the withheld photographs are "'graphic, explicit, and extremely upsetting.'" Favish, 217 F.3d at 1174, Pet. App. 17. On remand, the district court ordered five photographs released, on the ground that they did not meet that test. Pet. App. 5. The court of appeals summarily affirmed with respect to four of these photographs. Pet. App. 1.

In so doing, the court of appeals brushed aside the claim by the Foster family that it was "horrified and devastated by the photograph leaked to the press and published on a national television network and in newspapers of Vince's dear dead hand holding the gun he used to kill himself." Pet. App. 62. The court of appeals specifically found that photograph was *not* "graphic, explicit, and extremely upsetting." Favish, 217 F.3d at 1174, Pet. App. 17. Yet despite the Foster family's devastation at previous publication of a photograph not

meeting the court's test,[9] the court of appeals concluded that additional death scene photographs of Foster's body must be released where they do not meet that test and affirmed the district court's decision to release those death scene photographs that the court of appeals did not find to be "graphic, explicit, and extremely upsetting."

The D.C. Circuit came to the opposite conclusion with regard to the same photographs, concluding that "the release of photos of the decedent at the scene of his death . . . qualifies as . . . an invasion" of the privacy rights of close survivors. Accuracy in Media, 194 F.3d at 123. The D.C. Circuit's decision was in accord with its prior decision that the test for release of autopsy reports is whether they would

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[9] The declaration of Mr. Foster's widow stated:

> I did not even open Vince's casket for fear of seeing him distorted by the autopsy. I surely cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him, coupled with the indignity of the whole world's viewing these pictures in tabloids or on the Internet. My understanding of the photographs is that all of them would be extremely upsetting to the family and cause us no end of pain and sorrow. The shock of seeing the picture of Vince on the television with the gun in his hand is still a horrifying memory for me....
> Pet. App. 60.

The declaration of Mr. Foster's sister stated:

> Our family was horrified and devastated by the photograph leaked to the press and published on a national television network and in newspapers of Vince's dear dead hand holding the gun he used to kill himself. That photograph has been shown in national media again and again, and every time I see it I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life. My mother has suffered unimaginable sorrow and depression in losing her only son, but her grief (and ours) has been compounded by the fear that she will see upsetting reports[] about him on her television set or see headlines and photographs in the tabloids on the grocery store racks where she shops....
> Pet. App. 62.

"shock the sensibilities of surviving kin." Badhwar v. United States Dep't of Air Force, 829 F.2d 182, 185-6 (D.C. Cir. 1987). This test conflicts with the Ninth Circuit's test, which appears to require that the photographs be "graphic, explicit, and extremely upsetting" to the ordinary viewer, who has not suffered the loss that makes indiscriminate publication of photographs of their loved one's body at the death scene so painful.

The decision below is also inconsistent with Reporters Comm. for Freedom of the Press, 489 U.S. 749, which held that public release of FBI rap sheets would violate the privacy exemption. Rap sheets are not "graphic, explicit, and extremely upsetting," but implicate privacy concerns for other reasons. Similarly, photographs of a loved one's corpse may implicate privacy concerns even if they are not considered "graphic, explicit, and extremely upsetting." See also United States Dep't of State v. Washington Post Co., 456 U.S. 595, 600 (1982) (privacy exemption not limited to "intimate" or "highly personal" information).

No other circuit has adopted the Ninth Circuit's interpretation. To the contrary, other circuits have interpreted privacy protection to extend to a variety of situations where disclosure of law enforcement records may result in annoyance, embarrassment or harassment, although the records are not otherwise "graphic, explicit, and extremely upsetting." New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir. 1984) (names of investigators protected although no "intimate detail or extremely compromising fact" is involved, because publicity would subject them to "harassment and annoyance"); Manna v. United States Dep't of Justice, 51 F.3d 1158, 1166 (3d Cir. 1995) (disclosure of names of law enforcement officers, interviewees and witnesses "may result in embarrassment and harassment"); Halloran, 874 F.2d at 321-22 and n. 10 (suspects and other persons interviewed in investigation of contractor fraud have privacy interest in not being

"associated with a criminal investigation" and in not having their comments about co-workers, clients and friends released to the public); Jones v. FBI, 41 F.3d 238, 246-47 (6th Cir. 1994) (identity of investigators subject to privacy protection); Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977) (identity of persons interviewed protected because of "public exposure or possible harassment"); KTVY-TV, 919 F.2d at 1469 ("legitimate privacy interest in not being harassed or embarrassed by other persons" outweighs public's interest in learning identities of those interviewed in federal homicide investigation); Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (mention of person's name in law enforcement file "carries a stigmatizing connotation").

In a case factually similar to this case, a district court, applying the D.C. Circuit's test of whether disclosure would "shock the sensibilities of surviving kin," refused disclosure of tapes of conversations among the crew of the space shuttle Challenger moments before it exploded. New York Times Co. v. NASA, 782 F.Supp. 628, 631 (D.D.C. 1991) (quoting Badhwar, supra). Similarly, the same district court refused to disclose x-rays of President Kennedy's body, although the government conceded that the x-rays "are not graphic." Katz v. Nat'l Archives & Records Admin., 862 F.Supp. 476, 483, 484 (D.D.C. 1994), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995).

4. There Is An Overriding Need To Establish Uniform Standards for Assessing FOIA Requests for Investigatory Material Implicating Privacy Concerns.

As the use of tape recordings and video cameras becomes increasingly frequent, law enforcement agencies obtain records containing oral and visual images of the events surrounding violent death. Recent examples include the tape of the last moments of Flight 93, voice mails left by individuals trapped in the World Trade Center, and the

videotape of the murder of Wall Street Journal reporter Daniel Pearl.[10] Public requests for this kind of material are likely.[11] Indeed, the City of New York, citing the surviving families' privacy concerns, has refused to release radio transmissions from the World Trade Center and consequently has been sued under the State's Freedom of Information Law.[12] The lack of a clear and uniform standard to govern this situation as it pertains to the FOIA is pointedly demonstrated by the disagreement between the court below and the D.C. Circuit over the photographs involved in this case. Accuracy in Media Inc., supra. This Court should grant certiorari to resolve the conflicts raised by the decision

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10 For a summary of the controversy over the tapes of Flight 93, see Sward, The Voice of the Survivors; Flight 93, Fight to Hear Tape Transformed Her Life, S.F. Chron., Apr. 21, 2002, at A1; Phillips & Eggen, Pilots Assail Plan to Play Flight 93 Voice Recording; Precedent Feared in FBI Decision to Let Victims' Families Listen, Wash. Post., Apr. 16, 2002, at A03. For telephone calls made from the World Trade Center, see Veale, Word for Word/Last Words; Voices From Above: 'I Love You, Mommy, Goodbye,' New York Times, Sept. 16, 2001, § 4, at 7. For CBS News's decision to broadcast non-graphic portions of the videotape showing Pearl's murder, and the video's circulation on the Internet, see El-Ghobashy & Hutchinson, Terrorist-Linked Video Showing Reporter's Execution Is Circulating on Internet, Pittsburgh Post-Gazette, May 16, 2002, at A-4; Morago & Weiss, Did CBS Make the Right Call on Pearl Video?, Hartford Courant, May 16, 2002, at D1.

11 Another example is the recent controversy over proposed public disclosure of the autopsy photographs of race car driver Dale Earnhardt. Earnhardt v. Volusia County, 2001 WL 992068 (Fla. Cir. Ct., July, 10, 2001)

12 New York Times Co. v. City of New York Fire Dep't, No. 110753/02 (Sup. Ct. N.Y. County filed June 14, 2002). See Records of 9/11 Response Not for Public, City Says, New York Times, July 23, 2002, at B3. The City asserts that in some transmissions "[v]ictims were recorded as they were experiencing life-threatening circumstances, in some instances as they were dying." Id.

below and establish uniform guidelines on an issue of unquestioned public importance.[13]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13] The fact that the court of appeals' opinion on the second appeal is unpublished does not bar the grant of certiorari. The court of appeals' prior published decision initially set forth the "graphic, explicit and extremely upsetting" test for privacy protection and refused to impose any significant factual burden on plaintiff's assertion that there was evidence of official wrongdoing sufficient to establish a public interest. Thus the published decision established the circuit conflicts that our petition for certiorari addresses. Moreover, this Court frequently has granted certiorari to review unpublished decisions. "A Closer Look at Unpublished Opinions in the United States Courts of Appeals," 3 J.App. Prac & Process 199, 227-28 (Spring, 2001) (since 1974, shortly after nonpublication rules were enacted, the Supreme Court has granted certiorari to review 57 unpublished opinions). See also, Comm'r of Internal Revenue v. McCoy, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case.").

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLAN J. FAVISH; **No. 01-55487**

Plaintiff - Appellant, **D.C. No. CV-97-01479-WDK**

SHEILA FOSTER ANTHONY, et al.,

Intevenors – Appellees,

v.

OFFICE OF INDEPENDENT COUNSEL,

Defendant-Appellee.

ALLAN J. FAVISH; **No. 01-55788**

Plaintiff - Appellee, **D.C. No. CV-97-01479-WDK**

SHEILA FOSTER ANTHONY, et al.,

Intevenors – Appellants,

v.

OFFICE OF INDEPENDENT COUNSEL,

Defendant.

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

ALLAN J. FAVISH;

Plaintiff - Appellee,

v.

OFFICE OF INDEPENDENT COUNSEL,

Defendant - Appellant,

and

SHEILA FOSTER ANTHONY, et al.,

Defendant-Intervenors.

No. 01-55789

D.C. No. CV-97-01479-WDK

ORDER

ENTERED: June 6, 2002

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Submitted May 20, 2002**
San Francisco, California

Before: PREGERSON, NOONAN and O'SCANNLAIN, Circuit Judges

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

The order of the district court of January 11, 2001 is AFFIRMED, except that photo 3 - VF's body looking down from top of berm is to be withheld.

Favish v. Independent Counsel 01-55487

PREGERSON, Circuit Judge, dissenting:

I continue to maintain that the record before the district court before remand was "sufficiently detailed for the district court to resolve the issues in this case" without an in camera review of ten photographs at issue. Favish v. OIC, 217 F.3d 1168, 1186 (9th Cir. 2000). Nevetheless, having personally viewed the ten photographs, I adhere to my prior conclusion that only the photograph of Foster's right hand clutching the gun should be released because "[t]he public's interest in disclosure of the remaining nine, never-before-released post-mortem Polaroid photographs does not outweigh the privacy interests of Vincent Foster's surviving family in the nondisclosure." Id.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLAN J. FAVISH,

Plaintiff-Appellant,

v

OFFICE OF INDEPENDENT COUNSEL,

Defendant-Appellee.

Nos. 01-55487, 01-55788, 01-55789

D.C. No. CV-97-01479-WDK

ORDER

ENTERED: August 16, 2002

Before: PREGERSON, NOONAN and O'SCANNLAIN, Circuit Judges

The majority of the panel has voted to deny the petitions for rehearing. Judge Pregerson would grant the petitions for rehearing. Judges Pregerson and O'Scannlain have voted to deny suggestions for rehearing en banc and Judge Noonan recommended denying the suggestions for rehearing en banc.

The full court has been advised on the suggestions for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Allan J. Favish v, Office of Independent Counsel
CV 97-1479-WDK

ENTERED
CLERK, U.S. DISTRICT COURT
January 12, 2001
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

PRESENT:

Hon. William D. Keller, Judge
Catherine Jeang, Courtroom Deputy Clerk
None Present, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: None Present

ATTORNEYS PRESENT FOR DEFENDANTS: None Present

PROCEEDINGS:

The context of this summary judgment ruling is informed by the underlying decision of the Circuit as found at 217 F.3d 1168. The decision requires a review in lieu of affidavits. And, the decision to release is to be determined by balancing the respective interests of the public and the survivors. In this case, the appellate court appears to have defined the zone of privacy protection as those photographs that are "graphic, explicit and extremely upsetting." See the decision at page 1174.

Having the foregoing in mind and following review of the photographs in issued as identified in the Notice of Submission Under Seal of 10 Original Polaroid Pictures to Court for Court's In Camera, Ex-Parte Examination, which was filed January 9, 2001, the Court focuses on the first five Polaroids set forth in Exhibit 2 to the Notice and concludes as follows:

- The photograph identified as "3 – VF's body looking down from top of berm" must be released, as the photograph is not so explicit as to overcome the public interest.
- The photograph identified as "4 – VF's body – focusing on face" is an absolute intrusion into the zone of privacy of the survivors, and as such is not discoverable.
- The photograph identified as "5 – VF's body focusing on Rt. side shoulder/arm" is again of such a nature as to be discoverable in that it is not focused in such a manner as to unnecessarily impact the privacy interests of the family.

As regards the balance of the photographs referenced at page 46 of the exhibit to the notice, the Court rules as follows:

- The photograph identified as "1 – Right hand showing gun & thumb in guard" is discoverable as it may be probative of the public's right to know.
- The photograph identified as "3 – VF's body focusing on face" is not discoverable as it does invade the zone of privacy.
- The photograph identified as "4 – VF's body focusing on right side and arm" is discoverable.

- The photograph identified as "5 – VF's body - focus on Top of head thru heavy foliage" is discoverable.
- The photograph identified as "6 – VF's body - focus on head and upper torso" is so explicit as to violate the privacy of the survivors and is not discoverable.
- The photograph identified as "7 – VF's face - looking directly down into face" is again so explicit as to be clearly in violation of the survivors' privacy.
- The photograph identified as "8 – VF's face - Taken from right side focusing on face & blood on shoulder" is again so explicit as to be not discoverable as it clearly violates the privacy of the survivors.

Accordingly, summary judgment is entered in favor of the OIC with respect to photograph #4 from the top section of the exhibit list and photographs #3, #6, #7 and #8 identified in the bottom section of the exhibit list. Absent an appeal, the photographs must be provided to the plaintiff's counsel within 60 days [see Federal Rules of Appellate Procedure. Rule 4(a)(1)(B)] of this order. In the event of an appeal, the photographs subject to the appeal will remain under seal until such time as there is a final decision by the Court of Appeals.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

ALLAN J. FAVISH, Plaintiff-Appellant,

v.

OFFICE OF INDEPENDENT COUNSEL,
Defendant-Appellee.

217 F.3d 1168 (9th Cir. 2000)
No. 98-55594

Argued and Submitted Nov. 1, 1999

ENTERED: July 12, 2000

Appeal from the United States District Court for the Central District of California

William D. Keller, District Judge, Presiding.

D.C. No. CV-97- 01479-WDK.

Before: PREGERSON, NOONAN, and O'SCANNLAIN, Circuit Judges.

Opinion by Judge NOONAN; Partial Concurrence and Partial Dissent by Judge PREGERSON

NOONAN, Circuit Judge:

Allan J. Favish appeals the judgment of the district court granting summary judgment to the Office of Independent Counsel (the OIC) in his action under the Freedom of Information Act, 5 U.S.C. § 552 (1999) (the FOIA). Favish seeks 10 photos relating to the death of Vincent W. Foster, Jr., the Deputy Counsel to the President. Holding the OIC

has not established that the photos fall within the privacy exemption of the FOIA, we reverse the judgment of the district court and remand for further proceedings.

FACTS AND PROCEEDINGS

On July 20, 1993, Foster was found dead in Fort Marcy Park. His death was investigated by the National Park Service and the Federal Bureau of Investigation and by a committee of the House and by a committee of the Senate. *See Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C.Cir.1999). It was also investigated twice by the OIC. These inquiries all concluded that Foster committed suicide.

Favish is a lawyer not convinced by the reasoning of these prior investigators and skeptical of the thoroughness of their investigations. On January 6, 1997, he filed his request under the FOIA seeking from the OIC 150 photocopies of photographs compiled for law enforcement purposes. The photos were identified in the request by reference to *Hearings* Related to *Madison Guaranty S & L and the Whitewater Corporation--Washington. D.C. Phase* United States Senate, 103d Cong. (1994), with the exception of one photo of a gun in Foster's hand, identified as having been published by *Time*. March 18, 1996 and on ABC-TV. Favish sought higher quality copies of these already-published materials and copies of 9 unpublished photos. He offered to pay for the reproduction. On January 24, 1997, the OIC denied his request, stating that the photos were exempt under 5 U.S.C. § 552(b)(7)(A) (records whose "release could reasonably be expected to interfere with enforcement proceedings") and under § 552(b)(7)(C) (relating to personal privacy). Favish appealed this decision to a higher level of the agency. On February 19, 1997, the OIC denied his appeal, reiterating the exemptions asserted but not explaining how they applied.

On March 6, 1997, Favish filed this suit. On April 28, 1997, the OIC answered making no reference to any exemption and simply denying that Favish was "entitled to the relief sought." On January 5, 1998, the OIC filed a Vaughn index referring to the requested material; at the same time the OIC released 118 copies of the requested photos in black and white. Favish withdrew his request with respect to 21 photos. Eleven photos remained in dispute, as did Favish's request for color versions of the photos released. Both sides moved for summary judgment.

On March 11, 1998 the district court gave summary judgment to Favish as to his request for color photos, to be paid for by Favish, and as to a photo of Foster's eyeglasses. As to the 10 remaining photos, the court balanced the privacy interest of members of the Foster family against the public interest served by new copies of the photos, concluded that the public interest was outweighed by the privacy interest, and gave judgment for the OIC.

Favish appeals.

ANALYSIS

A Preliminary Question. Sua sponte, the court asked whether Favish was collaterally estopped by having been associate counsel for Accuracy in Media, the losing plaintiff in *Accuracy in Media, supra.* In response, arguing for estoppel, the OIC cited decisions of this circuit where privacy leading to estoppel has been found when a party to a judgment virtually represented "a person now sought to be estopped." Virtual representation, however, has been based on an express or implied legal relationship that makes the party accountable to the person sought to be estopped. *United States v. Geophysical Corp. of Alaska.* 732 F.2d 693, 697 (9th Cir. 1984); *United States v. ITT Ravonier, Inc.,* 627 F.2d 996, 1003 (9th Cir. 1980). We

have not found a case where a client is accountable to its lawyer. The identity of interest between Favish and Accuracy in Media is "an abstract interest in enforcement" of FOIA, an interest insufficient to create privity. *ITT Rayonier, Inc.*, 627 F.2d at 1003. Collateral estoppel does not apply.

The Command and Purpose of the Statute. The alpha and omega of this case is the statute that prescribes the conditions for the release of records of a public agency when a person makes a request of the agency for a record within its possession. The statute in relevant part reads as follows:

> (a) Each agency shall make available to the public information as follows:
>
> . . . . .
>
> (3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person.
>
> 5 U.S.C. § 552(a)(3)(A).

Three features of the statutory command are of particular note. The duty to make the information available to the public is mandatory ("shall make", repeated). The agency response is to be made to *any* request and to *any* person (emphasis supplied). The agency response is to be made promptly (no need for emphasis on this term aimed at the sluggishness all too characteristic of bureaucracies).

The words of a statute are, of course, dead weights unless animated by the purpose of the statute. The purpose of this statute is to shed light "on an agency's performance of its

statutory duties." *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-73, 103 L.Ed.2d 774 (1989). The statute is a commitment to "the principle that a democracy cannot function unless the people are permitted to know what their government is up to." *Id.* (internal quotations omitted). The statute's "central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *Id.* at 774.

The Statutory Exemption Invoked. First, the OIC denied Favish's request on one ground that made no sense, viz, that release of the photos would interfere with law enforcement proceedings. It took over a year for the OIC to abandon this position. The bulk of the photos requested were already in the public domain. How higher quality photos released to Favish would interfere with law enforcement was not and has not been explained by an agency under a statutory duty to comply promptly with a freedom of information request.

Second, after the OIC did release new copies of the 118 photos it had withheld without adequate explanation, it did not release them in color, nor did it release a new copy of Foster's eyeglasses. The OIC has now released copies in color and a new copy of the eyeglasses photo, thanks to the order of the district court. Not appealing that order, the OIC tacitly admits that it had no legal right to withhold this material.

Third, in its answer to Favish's complaint, the OIC specifically referred to his request for a new copy of the photo published in *Time*, March 18, 1996 and on ABC-TV ~~and stated~~ that the OIC was "without sufficient information or knowledge to form a belief as to the truth of the allegations" that the photo had been published in the forms alleged. This denial was on its face implausible.

How could the OIC not discover, with a modicum of diligence, whether a photo published in national news media had not come from its files? But the OIC did not abandon this posture in the ensuing litigation. In its brief on this appeal, the OIC declared that it did not concede that the photo had come from its files and added that Favish's argument "that the photograph already has been widely disseminated" should, therefore, be rejected. Only on appeal in this court, at oral argument, did counsel for the OIC state that it was true that the OIC possessed the photo referred to in Favish's request.

In the proceedings before the district court, although not in its answer, the OIC invoked this exemption:

> (b) This section does not apply to matters that are
>
> . . . . .
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy....
>
> 5 U.S.C. § 552(b)(7)(C).

Here four terms are significant: "production", that is, the release of the records, is what must be expected to have the undesired result: "expected,'' meaning what may be predicted with probability by a reasonable person, that is, the standard is objective; "unwarranted", that is, unjustified by the purpose of the statute; and "privacy," that is, a right held dear in our democracy. The root meaning of privacy has perhaps been best expressed in the article that launched its legal career. The principle is "that of an inviolate personality." Samuel D. Warren and Louis D. Brandeis, *The Right To Privacy*, 4 Harv. L.Rev. 193, 205 (1890). The statutory term, it is worth adding, is

modified by "personal" and is phrased as "privacy," not "privacy interest."

The statutory command coupled with the statutory exemption requires "balancing" of the personal privacy expected by a reasonable person to be invaded by the production of the records against the public purpose served by release. *Reporters Committee*, 489 U.S. at 776. Deference to the determination of the agency that the exemption applies is not due; the burden of the proof that the request may be properly denied because of an exemption rests with the agency. The court "shall determine the matter de novo." § 552(a)(4)(B). The "burden is on the agency to sustain its action." *Id.*

Application of the Statute. Favish's request focuses on how the OIC conducted its investigation of Foster's death. So doing, his request is in complete conformity with the statutory purpose that the public know what its government is up to. Nothing in the statutory command conditions agency compliance on the requesting party showing that he has knowledge of misfeasance by the agency, although at times evidence of such knowledge has been referred to as enhancing the urgency of the request. *See Hunt v. FBI*, 972 F.2d 286, 289 (9th Cir.1992). Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts; but it is not the function of the court in a FOIA proceeding to weigh such evidence or adjudicate such arguments. *See Washington Post Co. v. U.S. Dep't of Health and Human Services*, 865 F.2d 320, 325 (D.C.Cir.1989).

Nothing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations. To anyone familiar with famous cases in the Old World or in the New it is a feature of famous cases that they generate controversy, suspicion, and

the desire to second guess the authorities. The continuing discussion of the assassination of President Kennedy may suffice to make the point. The statute establishes a right to look, a right to speculate and argue again, a right of public scrutiny that can be denied only if the relevant statutory exemption applies.

The exemption invoked now is the privacy of "the Foster family members." The OIC relies on a declaration made under oath by Sheila Foster Anthony, Foster's sister, that release of the photos "would set off another round of intense scrutiny by the media," leading the family to be "the focus of conceivably unsavory and distasteful media coverage." The family members who would be distressed by this feared coverage are identified by Anthony as Foster's mother, his children, herself, and Foster's widow.

Strictly speaking, it is not "the production" of the records that would cause the harms suggested by the declaration but their exploitation by the media including publication on the Internet. But the statutory reference to what may "reasonably be expected" encompasses the probable consequences of the release. A preliminary question for decision is whether these consequences would invade the personal privacy of persons protected by the exemption. The question is not free from difficulty due to the imprecision of the statutory phrase.

The statute does not identify whose personal privacy may not be unjustifiably invaded. The statute therefore leaves open the possibility that the exemption does extend to others than the person to whom the information relates, although as a matter of first impression "personal" might seem to refer only to that person. As it happens, the question is not one of first impression in the courts. Release of the photos of the body of the assassinated president has been held to invade the privacy of members

of the Kennedy family. *Katz v. National Archives & Records Administration*, 862 F.Supp. 476, 485 (D.D.C.1994), *aff'd on other grounds*, 68 F.3d 1438 (D.C.Cir.1995). Release of a tape of the last conversation of the astronauts on the Challenger has been blocked because it would invade the privacy of their families. *See New York Times Company v. National Aeronautics and Space Administration*, 920 F.2d 1002, 1009- 10 (D.C.Cir.1990) and 782 F.Supp. 628 (D.D.C.1991) (on remand).

It could, no doubt, be suggested that the president or the astronauts so tragically destroyed were special cases, leading to special solicitude for the feelings of their families. That would be a constricted reading of the precedents. What the cases point to is a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one. To violate that memory is to invade the personality of the survivor. The intrusion of the media would constitute invasion of an aspect of human personality essential to being human. the survivor's memory of the beloved dead.

We hold as a matter of law that the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure.

Balancing is one of the most pervasive and most elusive metaphors in the law. We do not literally balance, because what is being brought into a comparison has no weight. To many, balancing sounds like assigning hypothetical weights. To others, it may suggest the kind of equilibrium the biological systems of the body achieve. Taken in

either sense, balancing seems to require the exercise of discernment in a particular case. Our standard of review of such a question has been carefully set out in *Schiffer v. The FBI*, 78 F.3d 1405 (9th Cir.1996). Where facts are not in dispute, we review de novo as a matter of law the district court's determination of "whether a document fits within one of FOIA's prescribed exemptions." *See id*, at 1409.

We do not, however, have before us all the relevant facts. The OIC represents that the 10 withheld photographs are "graphic, explicit, and extremely upsetting." That description is not true of the photo already published in *Time* and on television, showing a hand holding a gun. It may be true of the remaining 9 photos. But no court has ever seen them. The district court has discretion to decide a FOIA case on the basis of affidavits, and affidavits are in some cases sufficient. *Quinon v. F.B.I.*, 86 F.3d 1222, 1229 (D.C.Cir.1996). But when the agency affidavits are insufficiently detailed, *in camera* review is appropriate, *Id.* at 1228. Balancing without a knowledge of what the photos show would be an exercise in the air. Accordingly, we return the case to the district court to examine the photos in camera and to balance the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release.

Conclusion. The judgment of the district court is REVERSED and the case REMANDED for proceedings consistent with this opinion,

PREGERSON, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)"),[24] Vincent W, Foster Jr.'s surviving family members have a cognizable privacy interest in the ten post-mortem Polaroid photographs of Vincent Foster's face and body that Appellant Allan J. Favish has requested. I also agree that the family's privacy interest in the post-mortem photographs taken at the scene of Foster's death by a self-inflicted gunshot wound must be balanced against the public's interest in disclosure. I disagree, however, that remand for an in camera inspection of the photographs is necessary before these interests can be properly balanced. I believe the affidavit and exhibits contained in the "Vaughn index"[25] submitted by the Office of Independent Counsel ("OIC") are sufficiently detailed to justify withholding these photographs under Exemption 7(C). I also believe that the district court properly balanced the family's privacy interest against the public's interest in the production of the photographs and concluded that their disclosure "'could reasonably be expected to constitute an unwarranted invasion of [the family's] privacy.'" *See Hunt v. FBI.* 972 f.2d 286, 287-289 (9th Cir. 1992) (quoting U.S.C. § 552(b)(7)(C). On this basis, I would hold that the nine. never-before-released post-mortem Polaroid photographs of Foster's face and body are exempt from disclosure under Exemption 7(C). I would, however, order the release of the photograph of Foster's right hand clutching the gun, which previously appeared in Time Magazine and other media.

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[24] Exemption 7(C) exempts production of "records or information compiled for law enforcement purposes ... to the extent that production ... could reasonably be expected to constitute an unwarranted invasion of personal privacy... ."5 U.S.C. § 552(b)(7)(C).

[25] The Vaughn index derives its name from the case of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

I. The Vaughn Index

A. General Principles

In a FOIA case, the government agency seeking to withhold requested documents has the burden of proving the applicability of any FOIA exemption claimed, *see Minier v. CIA*, 88 F.3d 796, 800 (9th Cir.1996), and "the district courts are to review de novo all exemption claims advanced" by the government, *King v. United States Dep't of Justice*, 830 F.2d 210, 217 (D.C.Cir.1987). Because the agency has sole access to the withheld documents, the ordinary rules of discovery do not operate in a FOIA case to "give each party access to the evidence upon which the court will rely in resolving the dispute between them." *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir.1991). "'This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system[ ]'" *Id.* (quoting *Vaughn*, 484 F.2d at 824) (alteration in original). To correct this imbalance, the courts devised the Vaughn index requirement, which may be imposed on government agencies seeking to withhold documents requested under FOIA. *See id.*; *see also Fiduccia v. United States Dep't of Justice*, 185 F.3d 1035, 1042 (9th Cir.1999) (noting that "[t]here is no statutory requirement of a Vaughn index or affidavit.").[26]

"The purpose of the Vaughn index is to 'afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholdings.'" *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir.1995) (quoting *Wiener*, 943 F.2d at 977). The Vaughn "index

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[26] In fact, "Congress did not speak of an "index" [in FOIA]. The statute says that an agency has [only] to 'notify the person making such request of [the] determination [to withhold the documents sought] and the reasons therefore.'" *Fiduccia*, 185 F.3d at 1042 & n. 9 (quoting 5 U.S.C. § 552(a)(6)(A)(i)).

functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." *Wiener*, 943 F.2d at 977-78. "Consistent with its purpose, a Vaughn index is not required where it is not needed to restore the traditional adversary process." *Wiener*, 943 F.2d at 978 n. 5. For example, a Vaughn index is unnecessary where "the FOIA requester ha[s] acquired sufficient facts to permit the adversary process to function." *Id.* (citing *Brown v. FBI*, 658 F.2d 71, 74 (2d Cir.1981)). "[W]hen a FOIA requester has sufficient information to present a full legal argument, there is no need for a Vaughn index." *Minier*, 88 F.3d at 804.

To fulfill its purpose, a Vaughn index must "identify[ ] each document withheld, the statutory exemption claimed, and [provide] a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Id.* at 977. The Vaughn index may consist of detailed affidavits or other evidence "showing that the information logically falls within the claimed exemptions." *Minier*, 88 F.3d at 800 (citation omitted). Such affidavits may not be "vague" or merely "conclusory," *King*, 830 F.2d at 219, but should disclose "as much information as possible without thwarting the [claimed] exemption's purpose." *Wiener*, 943 F.2d at 978 (citation omitted) (alteration in original).

B. The Sufficiency of the OIC's Vaughn Index

The majority opinion states that the OIC's Vaughn index is insufficiently detailed with respect to the ten post-

mortem Polaroids at issue on appeal[27] because the OIC described these photographs as "graphic, explicit, and extremely upsetting," including the photograph depicting Vincent Foster's hand clutching the gun. Majority Op.at 1174. According to the majority opinion, because the latter photograph is not "graphic" and no court has ever seen the nine other photographs. "[b]alancing [the public's interest in their disclosure against the personal privacy interest in nondisclosure] without a knowledge of what the photos show would be an exercise in the air." *Id.* On this basis, the majority concludes that remand for an in camera inspection of the photographs is necessary. I disagree.

The fact that no court has seen these photographs is not dispositive on the question whether in camera review is required. If that were the litmus test for when in camera review should be undertaken, in camera review would be required in almost every FOIA case. That is not what FOIA requires. Under FOIA, "the decision to conduct an in camera review is committed to the broad discretion of the trial court judge." *Quinon v. FBI*, 86 F.3d 1222, 1227

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[27] The OIC's Vaughn index actually consisted of an affidavit and exhibits numbering over 200 pages that addressed Favish's FOIA request in its entirety. Favish's FOIA request ultimately embraced over a hundred photographs, including 129 photographs and written information appearing in 32 photographs (on front or back). The index provided: (1) photocopies of the fronts and backs of all photographs that had been previously released by the OIC to the United States Senate; (2) a photocopy of the FBI Receipt describing the photographs that had not been previously released at all; (3) a description of the OIC's system for searching for the requested photographs and detailed explanation of the form used for identifying and justifying any redacted information or photographs withheld in their entirety; (4) the pre-litigation correspondence between the parties; and (5) narrative descriptions of the requested photographs and written information appearing on them that generally identified the photographs or portions thereof being withheld by the OIC, the exemption claimed, and the justification for withholding the exemption, including the interests to be harmed from the disclosure of the information.

(D.C.Cir.1996) (citations omitted); *see also* 5 U.S.C. § 552(a)(4)(B) (Supp.1999). "The in camera review provision ... is designed to be invoked when the issue before the District Court *could not otherwise be resolved;* it ... does not mandate that the documents be individually examined in every case." *NLRB v. Robbins Tire & Rubber Co.*. 437 U.S. 214, 224, 57 L.Ed.2d 159 (1978) (emphasis added). Thus, "an in camera review should *not* be resorted to as a matter of course, simply on the theory that 'it can't hurt.'" *Quinon*, 86 F.3d at 1228 (emphasis added).

I believe that the OIC's Vaughn index's description of the ten post- mortem Polaroid photographs is sufficiently detailed for the district court to resolve the issues in this case. Indeed, it is unclear exactly what an in camera review would add to the district court's already thoughtful and thorough analysis of the issues here.

The OIC's Vaughn index did not just describe the photographs as "graphic" as the majority opinion suggests. The index contained a general narrative description of the nine post-mortem photographs, which stated:

> The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C).

The OIC's Vaughn index also included a photocopy of the FBI "Receipt for Property Received/Returned/Released/ Seized" ("the FBI Receipt") that set forth a handwritten description of the ten postmortem Polaroid photographs

and eight other photographs[28] that were taken by the National Park Service at the scene of Vincent Foster's death in Fort Marcy Park. The FBI Receipt uses Vincent Foster's initials, "VF," and describes the ten post-mortem Polaroids as follows:

> VF's body--looking down from top of berm
> ... VF's body--focusing on face
> ... VF's body--focusing on rt. side shoulder/arm
>
> * * * * * *
>
> ... right hand showing gun & thumb in guard
>
> * * * * * *
>
> ... VF's body taken from below feet
> ... VF's body focusing on right side & arm
> ... VF's body focus on top of head thru heavy foliage
> ...VF's body focus on head & upper torso
> ... VF's face--looking directly down into face
> ... VF's face--Taken from right side focusing on face & blood on shoulder....

No one disputes that Vincent Foster died when a .38 caliber revolver was placed in his mouth and the trigger was pulled. It is therefore difficult to understand just how much more detail the OIC would have had to provide to satisfy the majority. Certainly, what the OIC did provide was "as much information as possible without thwarting the purpose of the exemption claimed." *Wiener*. 943 F.2d at 979.

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[28] The other eight Polaroids listed on the FBI Receipt on page 2112 are not at issue on appeal because copies of seven of them were released to Favish pursuant to stipulation lodged in district court on February 9, 1998, and the district court ordered the release of a copy of the eighth photograph. depicting Vincent Foster's eyeglasses lying on the ground at Fort Marcy Park. The eight Polaroids released pursuant to stipulation depict the location and environs where Vincent Foster was found dead and the interior of the car he purportedly drove to Fort Marcy Park.

More importantly, Favish does not argue with the OIC's description of what the photographs depict (e.g., the head, face, or body of Vincent Foster). Nor does he suggest that the OIC's description of these photographs was provided in bad faith. His argument is with how the OIC interpreted the photographs and the conclusions the OIC drew from them. In particular, Favish disputes the OIC's conclusion that the photographs establish that Foster committed suicide. Generally speaking, in camera inspection would be appropriate where a FOIA request specifies only the *kind* of information sought and the Vaughn index provides insufficient detail for the district court to determine whether the withheld documents qualify for the claimed exemption. *See Wiener*, 943 F.2d at 978-79. But where, as here, the Vaughn index provides (1) sufficient detail to permit meaningful review of the exemptions claimed, (2) there is no evidence of bad faith on the part of the governmental agency, and (3) "the dispute turns on the ... parties' interpretations of [the withheld] documents," not their contents, in camera review may not be necessary. *Quinon*, 86 F.3d at 1228. Given such circumstances, I cannot agree with the majority opinion's conclusion that the district court abused its discretion in declining to conduct an in camera review in this case.

Finally, the record and discussion *infra* clearly establish that Favish had "sufficient information [about the post-mortem photographs] to present a full legal argument" in this case and in another FOIA case presented to the Court of Appeal for the District of Columbia. *See Accuracy in Media, Inc. ("AIM") v. National Park Service*, 194 F.3d 120 (D.C.Cir.1999), *cert. denied.* --- U.S. ----, 120 S.Ct. 1966, 146 L.Ed.2d 797 (2000). AIM's FOIA case sought black and white copies of precisely the same photographs that Favish seeks color copies of here. As AIM's co-counsel, Favish wrote the reply brief considered in AIM' s

appeal to the D.C. Circuit. That reply brief is in large measure identical to the appellate brief filed in his appeal to this court. The D.C. Circuit held the photographs exempt under Exemption 7(C). *See id.* at 123-25. In so ruling, the court rejected the same claim about the Vaughn index that Favish makes in this case, viz: "that the Vaughn index falls short in not revealing just how graphic each of the photos is." *Id.* at 125. As the D.C. Circuit stated: "Given the subject matter, we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic." *Id.* I agree.

II. Exemption Under 7(C)

A. General Principles

Having determined that in camera review is unnecessary because the factual basis for the district court's decision is sufficient, the next issue is whether the OIC properly withheld the post-mortem Polaroid photographs under Exemption 7C). Although FOIA's exemptions "'must be narrowly construed,' ... the[se] ... exemptions are intended to have meaningful reach and application." *John Doe Agency v John Doe Corp.*, 493 U.S. 146, 152, 107 L.Ed.2d 462 (1989) (quoting *Department of the Air Force v. Rose*, 425 U.S. 352. 361, 48 L.Ed.2d 11 (1976)). Congress enacted Exemption 7(C) and the other FOIA exemptions because it "'realized that legitimate ... private interests could be harmed by release of certain types of information.'" *Id.* at 152 (quoting *FBI v. Abramson*, 456 U.S. 615, 621. 72 L.Ed.2d 376 (1982)). Thus, Exemption 7(C) permits the government to withhold documents "compiled for law enforcement purposes, but only to the extent that [the government establishes that] the production of such records could reasonably be expected to constitute an unwarranted invasion of personal privacy...." 5 U.S.C. § 552(b)(7)(C); *see also Schiffer v. FBI*, 78 F.3d 1405, 1409-10 (9th Cir.1996). To meet its

burden, the government need show "only that an unwarranted invasion of privacy could be reasonably expected, not that it will inevitably occur." *Hunt*. 972 F.2d at 288.

In determining whether the government has met its burden of "proof," a court weighs 'the public interest in disclosure against the possible invasion of privacy caused by the disclosure.'" *Id*. at 1409 (quoting *Hunt*, 972 F.2d at 287). The "sole cognizable public interest for FOIA is the interest 'to open agency action to the light of public scrutiny,' to inform the citizenry 'about what their government is up to.'" *Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803, 811 (9th Cir.1995) (quoting *Department of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 772-73, 103 L.Ed.2d 774 (1989)). The "'identity of the requesting party ... [thus has] 'no bearing on the merits of his [ ] FOIA request.'" *Schiffer*, 78 F.3d at 1411 (quoting *Reporters Comm.*, 489 U.S. at 771) (second alteration in original).[29] Rather, "[w]hether disclosure of a document under Exemption 7(C) is warranted must turn on the *nature of the requested document and its relationship to [this] 'basic purpose'*" ..... *Reporters Comm.*, 489 U.S. at 772 (internal citation omitted) (emphasis added).

To determine whether the government met its burden of proof concerning the applicability of Exemption 7(C) to the withheld Polaroid photographs, an understanding of the government's actions concerning Vincent Foster's death is necessary. *See Wiener*. 943 F.2d at 985 ("T]he public interest in disclosure, and the proper balancing of the two, will vary depending upon the content of the information and the nature of the attending

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[29] The majority thus mistakenly ascribes undue importance to the fact that Favish is a "skeptical" "lawyer" who personally disagrees with the government's interpretation of the post-mortem photographs.

circumstances."). This factual perspective is essential to the determination whether production of the photographs will shed any light on "what their government is up to." *Reporters Comm.*, 489 U.S. at 773.[30]

B. Factual Background

1. Vincent Foster's Death and the Multiple Investigations That Ensued

In late afternoon on July 20, 1993, Deputy White House Counsel Vincent W. Foster Jr. was found dead by a private citizen in Fort Marcy Park, a national park located in a Northern Virginia suburb of Washington, D.C. According to eyewitness accounts and the investigative reports of the FBI and U.S. Park Service published by a Senate committee on July 29, 1994, *see Hearings Relating to Madison Guaranty S & L and the Whitewater Development Corporation--Washington, D.C. Phase*, volume II, 103rd Cong. (2nd sess.1994) ("Senate Hearings Volume II"), a 911 call summoned the United States Park Police to a sloping embankment where a body--later identified as Vincent Foster--lay dead. Park Police found Foster's body facing up, with his head positioned slightly below the top of a berm and his body sloping down the embankment, enveloped in foliage; his extremities were apparently not clearly visible to witnesses who stood on the top of the berm. Park Police investigators took Polaroid and 35mm photographs of the death-scene, surrounding environs, and Mr. Foster's face and body--including the ten Polaroids at issue in this appeal. As they did so, they observed a .38 caliber revolver in Mr. Foster's right hand (his thumb still in the trigger guard), gunpowder residue or burns on his right hand web and forefinger, and a gunshot wound to his head. Blood was

[30] Here, the fact that the Polaroid photographs were "compiled for law enforcement purposes" is not disputed.

visible in his nose and mouth area, on his right shoulder area, and in a pool underneath his head. There was no sign of a struggle, no other signs of trauma to the body, and no indication that the foliage or vegetation around his body had been trampled by others.

Five government inquiries investigated the circumstances and cause of Vincent Foster's death. Because Fort Marcy Park is a national park, the U.S. Park Police, a component of the U.S. Park Service, had primary jurisdiction over the first investigation into Mr. Foster's death. After his death, a handwritten note was found torn in pieces at the bottom of Mr. Foster's briefcase in his White House office. The FBI had jurisdiction over the investigation into the circumstances surrounding the discovery of the note. On August 10, 1993, both the Park Police and the FBI announced their findings. The Park Police concluded that Mr. Foster committed suicide, and the FBI found no criminality in connection with the note's discovery.

A flurry of media exposes followed both announcements. Faced with mounting speculation about the circumstances of Vincent Foster's death and the Park Police's investigation into it, Attorney General Janet Reno appointed Robert B. Fiske, Jr. as a regulatory Independent Counsel, pursuant to 20 C.F.R. §§ 600 and 603.1, in part to investigate the circumstances surrounding Vincent Fosters death and the events that occurred in the White House following his death. On June 30. 1994, Mr. Fiske issued a 58-page public report on the death of Vincent Foster that reached the same conclusion as the Park Police: the "overwhelming weight of the evidence compels the conclusion ... that Vincent Foster committed suicide ..." by a self-inflicted gunshot wound. *Report of the Independent Counsel Robert B. Fiske, Jr., In re Vincent W. Foster, Jr.* (June 30, 1994).

Meanwhile, the House and Senate launched additional inquiries into the circumstances of Vincent Foster's death. Congressman William F. Clinger, Jr., the ranking Republican on the House Committee on Government Operations, instructed the Committee's staff to "thoroughly review ... the investigation into the death of White House aide Vincent W. Foster to determine if there had been any improper manipulation of the investigation by the White House or others." 140 Cong. Rec. H2177-05 (daily ed. Apr. 12, 1994) (statement of Rep. Clinger). And the Senate Committee on Banking, Housing, and Urban Affairs conducted public hearings to "investigat[e] ... and study" the Whitewater matter and "all matters that have a tendency to reveal the full facts about: .... (B) the Park Service Police investigation into the death of White House Deputy Counsel Vincent Foster, and (C) the way in which White House officials handled documents in the office of White House Deputy Counsel Vincent Foster at the time of his death; and ... make such findings of fact as are warranted and appropriate...." S. Res. 229, 103d Cong., 2d. Sess. (1994), 140 Cong. Rec. S7076-01 (June 16, 1994). Both inquiries categorically concluded that Mr. Foster committed suicide. *See Summary Report by William F. Clinger, Jr., Ranking Republican, Committee on Government Operations, U.S. House of Representatives, On the Death of White House deputy Counsel Vincent W. Foster, Jr.* (Aug. 12, 1994) ("all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20. 1993."); S.Rep. No. 103-433. 103d Cong., 4 (1995) ("[t]he evidence overwhelmingly supports the conclusion of the Park Police that on July 20. 1993, Mr. Foster died in Fort Marcy Park from a self-inflicted gunshot wound.").

Nevertheless, a fifth inquiry was undertaken by the Office of Independent Counsel pursuant to the Ethics in

Government Act of 1978, 28 U.S.C. §§ 591-599, as reauthorized by the Independent Counsel Reauthorization Act of 1994, Pub.L. No. 103-270, 108 Stat. 732. On August 5, 1994, Kenneth W. Starr was appointed statutory Independent Counsel by the Special Division of the United States Court of Appeals for the District of Columbia Circuit ("the Special Division"). Mr. Starr was authorized to conduct an extensive investigation into the circumstances of Mr. Foster's death, the handling of documents in Mr. Foster's White House office following his death, and other matters. *See Report on the Death of Vincent W. Foster, Jr., By the Office of Independent Counsel, In re: Madison Guaranty Savings & Loan Ass'n, to the Special Division of the United States Court of Appeals for the District of Columbia Circuit* (filed July 15, 1997) (leave to publish granted by the Special Division on Oct. 10, 1997, pursuant to 28 U.S.C. § 594) ("Starr Report"). To conduct the investigation, Mr. Starr assembled a team of experienced investigators and renowned forensic experts.[31] *See id.*

After a three-year investigation involving interviews with more than thirty witnesses and analysis of hundreds of documents, forensic reports, the physical evidence, and death-scene and autopsy photographs, Mr. Starr reached the same conclusion about Vincent Foster's death that the

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[31] "The investigators included an FBI agent detailed from the FBI-MPD Cold Case Homicide Squad in Washington. D.C.: an investigator who also had extensive homicide experience as a detective with the Metropolitan Police Department in Washington. D.C. for over 20 years; and two other OIC investigators who had experience as FBI agents investigating the murders of federal officials and other homicides." *Id.* at 111. The forensic experts included Dr. Henry C. Lee, Ph.D., an expert in physical evidence and crime scene reconstruction who is Director of the Connecticut State Police Forensic Science Laboratory; Dr. Brian D. Blackbourne, M.D., a forensic pathologist who is Medical Examiner for San Diego County; and Dr., Alan L. Berman, Ph.D. an expert suicidologist who currently is Executive Director of the American Association of Suicidology. *See id.* at 2.

Park Police, Independent Counsel Fiske, and the House and Senate Committees had reached: "The available evidence points clearly to suicide as the manner of death."[32] *Id.*

In sum, as the district court observed in this case, Vincent Foster's death has been the subject of intense scrutiny by the national media and "exhaustive[ly] investigat[ed]" in the course of five government inquiries. The unanimous, yet independent, conclusion of all inquiries is that Mr. Foster died from a self-inflicted gunshot wound on July 23, 1993 in Fort Marcy Park, Virginia.

2. Favish's FOIA Request and Complaint

On January 6, 1997--seven months before Mr. Starr filed his final report on the death of Vincent Foster with the Special Division of the District of Columbia Circuit and ten months before the OIC received the court's approval to publicly release that report--Favish sent a letter to the OIC requesting the release under FOIA of the "highest quality duplicate photographic [color] prints" of "photographs taken in connection with the investigation into the death of Vincent Foster." Favish specifically requested ten categories of photographs. The photographs requested in eight of the categories were identified by the page in Senate Hearings Report Volume II on which the Senate Committee on Banking, Housing, and Urban Affairs had

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[32] Mr. Starr's conclusion reflected that of Dr. Lee ("[a]fter careful review of the crime scene photographs, reports, and reexamination of the physical evidence, the data indicate that the death of Mr. Vincent W. Foster, Jr. is consistent with a suicide...."). Dr. Blackbourne ("Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."), and Dr. Berman ("In my opinion and to a 100% degree of medical certainty the death of Vincent Foster was suicide. No plausible evidence has been presented to support any other conclusion.").

previously[33] published copies. But, because the photograph of Mr. Foster's right hand clutching the gun and the nine postmortem Polaroid photographs of Mr. Foster's face and body had not been published in the Senate Hearings Report Volume II,[34] Favish requested

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[33] The Independent Counsel Reauthorization Act ("the Act") requires an independent counsel "to file a final report with the [Special] division of the [D.C. Circuit] court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." 28 U.S.C. § 592(h)(1)(B). Until that report is filed and the D.C. Circuit approves it, an OIC's investigation is considered ongoing. While an investigation is ongoing, the Act mandates that the OIC "exercise restraint" in releasing information that prosecutors "do not normally provide the public," *Conference Report on S. 24, Independent Counsel Reauthorization Act of 1994*, H.R. 103-511, 140 Cong. Rec. H36907-02, at *H3702 (2d Sess.1994), which would include death-scene Polaroid photographs. Congress instructed the OIC to exercise particular restraint where, as in the case of Vincent Foster's death, it decides not to prosecute anyone. *See id.*

[34] Since the U.S. Park Police turned the post-mortem photographs over to the OIC in 1994. the OIC has maintained that the privacy interests of Mr. Foster's surviving family members in these gruesome death-scene photographs outweigh the public interest in disclosure. For this reason, the OIC has refused to publish them in any form--including the OIC's report to Congress dated June 30, 1994 (prepared by independent Counsel Robert B. Fiske, Jr.) and its court-approved summary report dated October 10. 1997 (prepared by Independent Counsel Kenneth W. Starr). *See* Senate Hearings Volume II: Starr Report.

The OIC stated in the Starr Report that "based on traditional privacy considerations. This report does not include death scene or autopsy photographs. The potential for misuse and exploitation of such photographs is both substantial and obvious." *See* Starr Report at 16-17 (citing by way of comparison. e.g., Navy Report Omits Suicide Notes. N.Y. Times, Nov. 2. 1996. at 9 (regarding suicide of Admiral Boorda: "The Navy Department decided not to make the notes public.... Many other items in the report are blacked out. like the autopsy report and the identities of people interviewed by investigators."): *Katz v. National Archives and Records Admin.*, 68 F.3d 1438, 1441 (D.C.Cir.1995) ("Out of concern for the Kennedy family's privacy. ... the x-rays and photographs did not become a part of the record of the Warren Commission.")).

these photographs in two separate categories. One category requested the photograph of "Mr. Foster's hand with a gun still in it" that purportedly was broadcast by ABC-TV News in March 1994, reprinted in Time Magazine on March 18, 1996, and appears to have been "listed on page 2112" of the Senate Hearings Report Volume II. In the second category, Favish simply requested those Polaroid photographs "listed on page 2112" of the Senate Hearings Report Volume II. Page 2112 consists of a photocopy of the FBI Receipt discussed *supra*, which bears the handwritten description of the eighteen photographs taken by the National Park Service in Fort Marcy Park within hours of Vincent Foster's death.

By letter dated January 24, 1997, the OIC denied Favish's request in its entirety, citing Exemptions 7(A), 5 U.S.C. 552(b)(7)(A), which exempts from disclosure information that may reasonably interfere with an ongoing law enforcement investigation or proceeding, and Exemption 7(C). Favish administratively appealed on January 28, 1997. The appeal was denied by the OIC on February 19, 1997.

On March 6, 1997, Favish filed a complaint for injunctive relief in district court for the Central District of California. The complaint sought release of all photographs and information embraced by Favish's FOIA request.

After the Special Division granted the OIC leave to publicly release the Starr Report on October 10, 1997, the OIC reviewed the photographs and the information written on them that Favish sought by his FOIA request. The Special Division's approval of the Starr Report's public release marked the official conclusion of Mr. Starr's OIC investigation into Vincent Foster's death. Thereafter, the OIC withdrew its objection to production of the

photographs requested on the basis of FOIA Exemption (b)(7)(A).

On January 5, 1998, the OIC filed a Vaughn index and released black and white copies of 118 photographs in full (front and back) and fourteen photographs in part (front or back) that it had previously withheld. Copies of all of the released photographs were published in Senate Hearings Report Volume II.

On February 12, 1998, the district court entered the parties' "Stipulation to Dismiss With Prejudice Claims to Information Withheld Pursuant to Exemption (b)(3) and Claims as to Certain Information Withheld Pursuant to (b)(7)(C) and Identification of What Remains at Issue." Pursuant to that stipulation, the only photographs that remained in dispute were eleven post-mortem photographs taken in Fort Marcy Park: one depicting Mr. Foster's right-hand holding the gun, one depicting only Mr. Foster's eyeglasses lying on the ground in Fort Marcy Park, and nine post-mortem photographs of Mr. Foster's body and face. Exemption 7(C) was the only exemption claimed. And the parties stipulated that "[t]he *only* issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy." (Emphasis added.)

On February 11 and 13, 1998, the parties filed cross-motions for summary judgment. In support of its summary judgment motion and to establish the significant privacy interest at stake, the OIC filed the declaration of Sheila Foster Anthony, Mr. Foster's surviving sister. Writing on behalf of Vincent Foster's widow, three children, elderly mother, and other family members, Ms. Anthony expressed the

fervent[ ] belie[f] that releasing any photocopies depicting Vince's body post-mortem would constitute a painful warranted invasion of my privacy, my mother's privacy, and the privacy of Lisa Moody (widow of Vincent Foster), her three children and other members of the Foster family. Our family has suffered a great loss under extremely tragic circumstances, compounded by the barrage of newspaper and magazine articles and television reports that followed Vince's death. An intensely emotional and private matter drew national attention, and reporters, as well as simply curious individuals, harassed my grieving family in unbelievably insensitive ways. They do to this day. It is my ardent desire to protect my family as well as myself from additional torment which would result from the release of these graphic photographs.

I fear that the release of these photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage. I cannot adequately express how truly unjust, unfair and cruel it would be to subject my family to more public scrutiny and the dissemination of these photographs via the Internet or by other print and electronic means. No member of any family should ever be concerned with the possible public exposure of photographs of this nature.

The death of my brother has been more than adequately investigated. Five separate government inquiries have determined that Vince's death was a result of a self-inflicted gun wound. Therefore, I cannot fathom a legitimate or rational reason why the photographs should be released. The mere suggestion that these photographs would be released is unconscionable. The release of these photographs would only bring more agony to members of my family. We have endured

> enough pain and personal invasion by the media and by those who investigated the death of my brother. While I have tried here, I cannot adequately express the anguish release of these photographs would bring to me and the entire Foster family.
>
> The Court has been asked by the Government to uphold its position that the release of the photographs would be an unwarranted invasion of my personal privacy and that of Vince's family. I implore the Court to do all it can to protect Vince's family, but particularly his children, and his 83 year old mother, from further invasion and the distressing events that surely would result from the release of the photographs.

After hearing oral argument and reviewing the evidence, the district court granted partial summary judgment for Favish and ordered the OIC to produce the Polaroid photograph of Mr. Foster's eyeglasses lying on the ground at Fort Marcy Park and to produce color copies, at Favish's expense, of any photograph released in response his FOIA request if it was originally taken in color. The court, however, ruled that the privacy interests of Mr. Foster's surviving family members outweighed the public interest in disclosure of the nine postmortem Polaroid photographs of Vincent Foster taken in Fort Marcy Park under Exemption 7(C) and granted the OIC partial summary judgment on this basis. Favish timely appeals.

C. Balancing the Personal Privacy Interest at Stake Against the Public's Interest in Disclosure

1. The Privacy Interest

Favish concedes that release of the nine post-mortem Polaroids of Vincent Foster's face and body are likely to cause to Foster's surviving family members pain and anguish. Favish argues, however, that "family grief" or "emotional Grief" is not a legally cognizable privacy

interest under FOIA--an argument that the majority and I reject. As noted *supra*, the Court of Appeals for the District of Columbia in *AIM* was confronted with essentially the same FOIA request as that at issue here, As the *AIM* court stated:

> [one] cannot deny the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence. One has only to think of Lindbergh's rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle the resulting photos. While law enforcement sometimes necessitates the display of such ghoulish materials, there seems nothing unnatural in saying that the interest asserted against it by spouse, parents and children of the deceased is one of privacy--even though the holders of the interest are distinct from the individual portrayed.
> *Id.* at 123.

In the present case, the majority and I agree that, as a matter of law, FOIA protects the privacy interests that Vincent Foster's surviving family members have in the post-mortem photographs of the deceased and the intimate details of the circumstances surrounding his death that they reveal. *Cf. Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir.1991) (holding that the privacy interest of a deceased's family in the deceased's autopsy report is protected by FOIA's Exemption (b)(6)); *cf. also Hale v. United States Department of Justice*, 973 F.2d 894, 902 (10th Cir.1992) (finding that Exemption 7(C) exempts photographs of a deceased murder victim from disclosure because no discernible public interest outweighed "the personal privacy interests of the victim's family"), *vacated on other grounds*, 509 U.S. 918, 125 L.Ed.2d 717 (1993), *implicitly reinstated on remand.* 2 F.3d 1055, 105758 (10th Cir.); *New York Times Co. v. NASA.* 782 F.Supp. 628

(D.D.C.Cir.1991) (finding that the Challenger astronauts' surviving families have "valid and substantial" privacy interests in the voice communications of the astronauts tape recorded aboard the space shuttle immediately prior to its explosion); *Katz v. National Archives & Records Admin.*, 862 F.Supp. 476, 482 (D.D.C.1994) (accepting as undisputed that the Kennedy family has a privacy interest in the autopsy records of President Kennedy).

The survivors' privacy interests also involve their "right to avoid [ ] disclosure of personal matters:" or at least "to control the dissemination" of such information. *Reporters Comm.*, 489 U.S. at 762, 762-64 & n. 16. Favish argues that such privacy interests have been diminished in this case because the circumstances of Vincent Foster's death are publicly known. He is mistaken. "The Supreme Court explicitly rejected [a similar] argument in *Reporters Committee*, stating that ... the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" *Schiffer*, 78 F.3d at 1410-11 (quoting *Reporters Comm.*, 489 U.S. at 770-71; *see also FLRA*, 510 U.S. at 499) ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information be available to the public in some form.").

Here, there is simply no question that the release of these photographs "could reasonably be expected to constitute an unwarranted invasion" of the Foster family's personal privacy. Doing so will deprive the family of their right to "avoid" the dissemination of these highly personal photographs and to keep the "personal facts [they depict] away from the public eye." *Reporters Comm.*, 489 U.S. at 769-70 (citing *Whalen v. Roe*, 429 U.S. 589, 51 L.Ed.2d 64 (1977)). And that constitutes a cognizable and significant invasion of their privacy under FOIA. Unless

these photographs will "shed light on what the government is up to," and thus serve the sole public interest cognizable under FOIA. they should not be ordered released. *Reporters Comm.*, 489 U.S. at 773.

2. The Public's Interest in Disclosure

The governmental agency in question here is the O1C. The conduct in question is the OIC's two investigations into the circumstances of Vincent Foster's death and their conclusion that he committed suicide. As the district court stated, the public has a substantial interest in ensuring that the "OIC conducted a proper and thorough investigation."

But Favish has made no showing that anyone connected with the OIC's investigations--including Mr. Starr--engaged in wrongful conduct, failed in his or her official duties, or that the nine post-mortem photographs at issue will shed any light on the integrity of their investigations, the nature of the OIC's conduct, or the correctness of its conclusions. Although the government bears the burden of establishing that the photographs are exempt from disclosure under FOIA, *Schiffer*, 78 F.3d at 1409-10 (citing 5 U.S.C. 552(a)(4)(B)), "the person requesting the information must identify with reasonable specificity, how disclosure would advance the public interest." *Hale*, 973 F.2d at 900. Favish has failed to do so in this case with respect to the nine postmortem Polaroid photographs of Foster's face and body.

Favish's overarching argument is that the photographs are needed because the OIC's investigation was "grossly incomplete and untrustworthy." Such "generic platitudes clearly are not enough" to tilt the balance in favor of disclosure. *Id.* As the Seventh Circuit observed, the contention that private information is needed "to serve as a watchdog over the adequacy and completeness of an FBI investigation ... would apparently apply to every ...

criminal investigation, severely vitiating the privacy ... provision [ ] of [E]xemption (C)." *Miller v. Bell,* 661 F.2d 623, 630 (7th Cir.1981). As a general rule, "[g]overnment records and official conduct [are accorded] a presumption of legitimacy." *United States Dep't of State v. Ray*, 502 U.S. 164, 179, 116 L.Ed.2d 526 (1991). If the mere allegation that a senior government official, like an independent counsel is "untrustworthy"" or incompetent was sufficient to warrant disclosure of private matters that the senior official happened to have compiled, then FOIA's privacy exemptions would be meaningless. See *id.*

Five separate government inquiries have determined that Vincent Foster committed suicide by a gunshot in Fort Marcy Park on July 23, 1993. The two OIC investigations and the two congressional inquiries each sprung from doubt as to the thoroughness and integrity of the preceding investigation(s). Yet each ultimately reached the same conclusions, And each found no wrongdoing in the preceding investigation(s). Intense media scrutiny of these investigations and of the circumstances of Mr. Foster's death has also reached the same conclusion and has uncovered no wrongdoing. Clearly, the public's interest in further investigating Vincent Foster's death has significantly diminished.

Favish's individual contentions that disclosure of the nine post-mortem Polaroids will serve the public's interest also fall short of justifying their disclosure. Three of Favish's contentions have no logical link to the nine post-mortem Polaroids. Favish disputes statements by Mr. Starr made in his report regarding which officials were present during Vincent Foster's autopsy. But the nine photographs at issue were taken at Fort Marcy Park and depict Mr. Foster's face and body only. They will not shed light on who was present during his autopsy at all. Favish also takes issue with the witness identifications of Mr. Foster's

car in Fort Marcy Park at the time of his death. Again, the nine post-mortem photographs will not shed light on the basis for or veracity of these witness statements. Finally, Favish contends that there are possible discrepancies between the kind of gun that was reportedly found at the scene of Mr. Foster's death and the gun identified by his widow. Many of the 119 photographs already released to Mr. Favish depict the gun that was found at the scene of Mr. Foster's death and therefore speak directly to this aspect of the investigation. Nevertheless, because the photograph of Mr. Foster's right hand still clutching the gun has apparently already appeared in the national media and may shed further light on this aspect of the investigation, I believe that it should be released. The remaining nine post-mortem photographs, however, do not depict the gun and therefore should not be released for this purpose.

Favish's remaining contention is similarly insufficient to justify disclosure. Favish contends that the nine photographs of Vincent Foster's face and body are needed to explain purported deficiencies and inconsistencies in the Starr Report concerning the nature of Mr. Foster's wound.[35] The Starr Report concluded that Vincent Foster

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[35] For the first time on appeal, Favish also contends that the photographs at issue are needed to discern the correctness of two of Dr. Lee's conclusions: (1) that Vincent Foster's body was not "dragged" to the location where his body was found; and (2) that the post-mortem photographs possibly reveal bloodstains on the immediately surrounding vegetation. As purported proof that Dr. Lee's conclusion regarding "dragging" should not be believed, Favish points to the statements of the Park Police on the scene and Dr. Haut that Mr. Foster's body started to "slide down the hill" when they rolled him over to examine him and that they had to "pull" him back up. According to Favish. if Vincent Foster's body slid down the hill at all, Dr. Lee should have reported that there was some evidence of "dragging." At best, Favish's contention is speculative and amounts to nothing more than a difference of opinion.

died of a self-inflicted "gunshot [wound] through the back of his mouth exiting the back of his head" and that the exit wound was "three inches from the top of the head." *Starr Report* at 1, 31. Favish disputes this conclusion for two reasons: First, Favish contends that the Starr Report did not adequately explain the comment of a paramedic on the scene who viewed the body from a distance of two to three feet and initially reported that the entrance wound was on Mr. Foster's neck, near the jawline. Second, he contends that the Starr Report failed to mention that the report of the medical examiner at the scene, Dr. Donald Haut of the Fairfax County Medical Examiner's Office, was internally inconsistent. On one page of the report, Dr. Haut described Mr. Foster's wounds as "perforating gunshot wound mouth-head" and on the another page he described it as "mouth to neck." Favish claims that the statement on Dr. Haut's report that the wound was "mouth-head" was the product of an alteration.

As the D.C. Court of Appeals explained in *AIM* when it considered and rejected these same contentions:

> Depending on what one views as the "top" of the head, the discrepancy between [the statement that the exit wound was three inches from the top of the head] and assertions of a neck exit wound may be matters of characterization. Further, the paramedic, after reviewing photos (presumably belonging to the disputed set), admitted that he may have been mistaken

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As purported proof that Dr. Lee's statement concerning possible bloodstains on the vegetation was erroneous. Favish points to statements by a Park Police officer on the scene that "there was no blood splatter on the plants or trees surrounding the decedent's head" and a statement by Dr. Haut that he could recall no blood "on the vegetation around the body." Dr. Lee did not conclude that there were bloodstains on the vegetation, only that after viewing an enlarged, close-up view of the vegetation, there may have been bloodstains. *See Starr Report* at 59. Again, Favish's contention amounts to little more than a difference of opinion, with no suggestion of official misconduct or wrongdoing.

about Foster having a neck wound. *Starr Report* at 34 n. 77. Dr. Haut's report is internally inconsistent, with one assertion consistent with the later reports from Congress and two independent counsels. AIM asserts that the consistent entry on Dr. Haut's report was the product of an alternation.... Without more, however, [there is] hardly "compelling evidence" that any government actor has behaved illegally. At least while completing that part of the report. Dr. Haut presumably thought "head" correct....

When multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details. some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification. Nor does it suggest that the congressional or independent counsel inquiries got anything wrong regarding Foster's wounds. The Starr report is altogether credible in its assertion that the photos are "[s]ome of the best evidence" of the nature of Foster's wounds ... and those who have viewed them have concluded that Foster suffered an entrance wound in the mouth and an exit wound in the back of the head. The likelihood that the photos contradict the statements of all four investigating agencies [i.e., the Park Service, the FBI, Congress, and the OIC] seems remote. While we agree that falsification by the agencies would show government illegality ... there is no persuasive evidence of such falsification, much less compelling evidence.

AIM. 194 F.3d at 124. I agree.

III. CONCLUSION

The description in the OIC's Vaughn index of the ten post-mortem Polaroid photographs at issue is sufficiently detailed for the district court to resolve the issues in this

case. Consequently, remand for in camera review is unnecessary.

Moreover, I am persuaded that the public's interest in the OIC's two investigations of Vincent Foster's death is more than adequately served by the release of the 118 photographs that Favish has already obtained from the OIC, the photograph of Foster's eyeglasses that the district court ordered released to him, and the photograph of Foster's right hand clutching the gun that I believe should be released to him as well. The public's interest in disclosure of the remaining nine, never-before-released post-mortem Polaroid photographs does not outweigh the privacy interests of Vincent Foster's surviving family in their nondisclosure. Accordingly, under FOIA's Exemption 7(C), the government has established that their production could reasonably be expected to constitute an "invasion of privacy [that] is 'unwarranted.'" *Reporters Comm.*, 489 U.S. at 780.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Allan J. Favish v, Office of Independent Counsel

CV 97-1479-WDK

ORDER

ENTERED: March 11, 1998

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

PRESENT:
Hon. William D. Keller, Judge
Amalia Carrilo, Deputy Clerk
None Present, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: None Present

ATTORNEYS PRESENT FOR DEFENDANTS: None Present

PROCEEDINGS:

Before the Court are the parties' Cross Motions for Summary Judgment. The Court issued a preliminary ruling and held a hearing on this matter. The following is a clarification of the Court's final ruling, which was given orally at the hearing.

BACKGROUND

On January 6, 1997, Plaintiff Allan J. Favish sent to Defendant Office of Independent Counsel ("OIC") a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

Plaintiff's request sought photographs taken connection with the investigation into the death of Deputy White House Counsel Vincent Foster. On January 24, 1997, the OIC denied Plaintiff's request, asserting: (1) Exemption (b)(7)(A), which exempts from disclosure law enforcement information whose disclosure could interfere with enforcement proceedings [5 U.S.C. § 552(b)(7)(A)]; and (2) Exemption (b)(7)(C), which exempts from disclosure law enforcement information whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy" [5 U.S.C. § 552(b)(7)(C)]. The OIC also reserved the right to assert other relevant exemptions, Plaintiff administratively appealed the OIC's decision, and the appeal was denied on February 19, 1997.

On March 6, 1997, Plaintiff filed the present "Complaint for Injunctive Relief Under the Freedom of Information Act." On October 10, 1997, the United States Court of Appeals for the District of Columbia Circuit for the Purpose of Appointing, Independent Counsels (the "Special Division"), permitted the OIC report on the death of Vincent Foster to be released to the public. Following the release of this report, the OIC reviewed the photographs sought by Plaintiff and modified its response. As a result, the OIC withdrew its assertion of Exemption (b)(7)(A), but still asserted Exemption (b)(7)(C). Additionally, the OIC asserted Exemption (b)(3), which exempts from disclosure matters that are specifically exempted from disclosure by a separate statute, 5 U.S.C. § 552(b)(3).

On February 12, 1998, the Court entered the parties' "Stipulation to Dismiss With Prejudice Claims As To Information Withheld Pursuant to Exemption (b)(3) and Claims As To Certain Information Withheld Pursuant to (b)(7)(C) and Identification of What Remains At Issue." In that stipulation, the parties dismissed with prejudice Plaintiff's claims regarding all photographs withheld pursuant to Exemption (b)(3). Stipulation, at 1:26-2:12. The parties also dismissed with prejudice Plaintiffs claims regarding certain photographs withheld pursuant to Exemption (b)(7)(C). Stipulation, at 2:4-12. The stipulation also identified the documents that Plaintiff still seeks. Plaintiff still seeks 11 Polaroid photographs, including 9 post-mortem photographs of Foster's body in Fort Marcy Park. 1 post-mortem photograph of Foster's right hand holding a gun, and 1 photograph of Foster's eyeglasses lying on the ground at Fort Marcy Park. Stipulation, at 2: 13-19; Defendant's Motion for Summary Judgment, at 20:19 - 21:13.

The stipulation also stated that Defendant still asserts Exemption (b)(7)(C) to withhold the 11 photographs. The parties stipulated that the remaining 11 photographs were "compiled for law enforcement uses," the threshold requirement for Exemption (b)(7)(C). Stipulation, at 2: 19-22. The parties stated that "[t]he only issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy." Stipulation, at 2:22-25. In addition, the parties noted that Plaintiff claims that Defendant is required to produce color copies of the unredacted photographs already released to Plaintiff in black and white. Stipulation, at 2:25 - 3:1.

On February 11, 1998, Plaintiff filed the present motion for summary adjudication of issues, seeking an

order that (1) release of the eleven remaining photographs will not result in an unwarranted invasion of the privacy of Vincent Foster's surviving family members; and (2) release of color copies of the photographs already received is required by FOIA. On February 13, 1998, Defendant filed the present motion for summary judgment, claiming that no genuine issue of material fact exists with regard to the claimed exemption and that Defendant is entitled to judgment as a matter of law.

DISCUSSION

I. Cross Motions For Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate only where there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. All reasonable inferences are granted in favor of the non-moving party, however, the non-moving party must provide specific facts showing that there are genuine issues for trial, Fed.R.Civ.P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). When "the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In deciding a motion for summary judgment, the court must "determine whether the 'specific facts' set forth by the non-moving party, coupled with the undisputed background or contextual facts, are such that a reasonable jury might return a verdict in its favor based on the evidence," T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n., 809 F.2d 626, 631 (9th Cir. 1987). A

"party opposing summary judgment may not rest on conclusory allegations, but must set forth specific facts showing that there is a genuine issue for trial." Leer v. Murphy, 844 F.2d 628, 631 (9th Cir. 1988). A "mere scintilla of evidence" is insufficient to oppose a summary judgment motion under Rule 56. Anderson v. Liberty Lobby Co., 477 U.S. 242, 252 (1986).

B. Eleven Remaining Contested Photographs: Privacy Exemption Under 5 U.S.C. § 552(b)(7)(C)

Exemption (b)(7)(c) exempts from disclosure "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The parties have stipulated that the remaining 11 photographs were compiled for law enforcement purposes. Stipulation, at 2:19-22. Thus, as the parties recognize, "[t]he only issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy." Stipulation, at 2:22-25.

1. Privacy Interest of Foster's Surviving Family Members

The parties take opposite positions on the question of whether Foster's surviving family members have a privacy interest in the withheld photos, Defendant claims that the family members' privacy interests exist and of the 11 photographs. Defendant claims that the photographs sought by Plaintiff are "graphic, explicit, and extremely upsetting." Defendant's Motion, at 22. Defendant further claims that disclosure of these 11 photographs can reasonably be expected to cause the surviving Foster family members anguish beyond that which they have already suffered, thus

constituting an invasion of their personal privacy. Joseph Declaration, ¶¶ 15, 17. Plaintiff asserts that the concern argued by the OIC is not for the "privacy" of the Foster family members, which is protected by Exemption (b)(7)(C), but rather is an argument for a "family grief" exemption to FOIA which does not exist.

In support of its privacy argument, Defendant points to several cases which recognize such a privacy interest in surviving family members, including New York Times Co. v. National Aeronautics and Space Administration, 782 F.Supp. 628 (D.D.C. 1991). In New York Times, a reporter submitted a FOIA request to NASA seeking a copy of the voice communications tape recorded aboard the space shuttle Challenger prior to its explosion on January 28, 1986. Id. at 630. NASA provided the transcripts of the tape, but denied the request for a copy of the tape itself. claiming the privacy exemption under § 552(b)(6) ("Exemption (b)(6)")[22] Id. The district court found that the astronauts' families had a "valid and substantial" privacy interest against disclosures which would cause them to suffer additional anguish. Id. at 631. The court stated that the privacy interest included "reasonable expectations of undisturbed enjoyment in the solitude and seclusion of one's own home." Id. at 631-632 (citation omitted). The court noted that exposure to the voice of a

[22] Exemption (b)(6) exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Since the exemption argued in this case exempts records or information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy," the standards for determining whether each exemption applies obviously differ. However, both exemptions involve privacy interests, and there is no apparent difference in the privacy interests that may be recognized by the two exemptions. Therefore, the cases discussing the more stringent (b)(6) privacy standard are applicable to this Courts determination of whether the interest asserted by the OIC is a privacy interest recognized by Exemption (b)(7)(C).

deceased family member would cause the Challenger families pain and that the Challenger families would face a disruptive assault on their privacy if the tape were disclosed, because of the notoriety surrounding the accident. Id. at 631-632. The court found that this potential invasion of privacy outweighed the public interest in the disclosure of the tape. Id. at 633.

The court in New York Times cited Badhwar v. United States Department of the Air Force, 829 F.2d 182 (D.C. Cir. 1987), as another court that recognized privacy interests of relatives in various records of deceased family members. New York Times, 782 F.Supp. at 631. In Badhwar, the D.C. Circuit remanded for the district court to determine whether disclosure of a portion of an autopsy report would constitute a "clearly unwarranted invasion of personal privacy," because of the possibility that it would "shock the sensibilities of surviving kin." Badhwar, 829 F.2d at 186. In doing so, the court implicitly but necessarily recognized that such a privacy interest existed and remanded to determine whether the disclosure sought would impact that interest. Id.

Another district court has recognized this family privacy interest with regard to the Foster family members whose privacy is sought to be protected in the present case. See Dow Jones & Co. v. United States Department of Justice, 880 F, Supp. 145, 152 (S.D.N.Y. 1995). In Dow Jones, the court allowed the disclosure of an allegedly forged note found in Vincent Foster's briefcase. In doing so, the court recognized that the Foster privacy interest that would be impinged by the pain and anguish that would accompany the renewed scrutiny resulting from disclosure of the note. Id. The court allowed disclosure because it found that this privacy interest would be outweighed by the substantial public interest in viewing the note. Id.

Defendant also cites several cases which implicitly recognize such a privacy interest in the relatives of the

deceased. See Hale v. United States Department of Justice, 973 F.2d 894, 902 (10th Cir. 1992) (finding that Exemption (b)(7)(C) applied to exempt from disclosure photographs of a deceased victim, because no public interest could be discerned "that would outweigh the personal privacy interests of the victim's family"). vacated on other grounds, 509 U.S. 918 (1993)[23]; Katz v. National Archives & Records Administration, 862 F.Supp. 476, 473 (D.D.C. 1994) (accepting as undisputed that the Kennedy family has a privacy interest in the autopsy records of President Kennedy, limited to preventing public disclosure that would cause clearly unwarranted anguish or grief), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995); Bowen v. U.S. Food and Drug Administration, 925 F.2d 1225 (9th Cir. 1990) (holding that the FDA properly withheld medical records and autopsy reports under the (b)(6) privacy exemption, thereby necessarily recognizing a privacy interest belonging to others in documents relating to a deceased family member, at least with regard to the autopsy reports); Outlaw v. United States Department of the Army, 815 F.Supp. 505, 506 (D.D.C. 1993) (finding that the deceased's family members' privacy interest was "not substantial" and was outweighed by the public interest in disclosure).

Plaintiff assails this collection of persuasive authority by arguing that many of these cases did not expressly hold that such a privacy interest exists and by arguing that the courts that recognized such an interest did so "by making their own law"" in contravention of the Supreme Court's definition of privacy. Plaintiff's Motion, at 4:23. Plaintiff cites the Third

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[23] The Tenth Circuit's decision in Hale was vacated and remanded for reasons unrelated to Exemption (b)(7)(C) [Hale v. United States Department of Justice, 509 U.S. 918 (1993)], but Plaintiff concedes that the Tenth Circuit implicitly reinstated the portion of the opinion discussing Exemption (b)(7)(C) on remand [Hale v. United States Department of Justice, 2 F.3d 1055, 1057-58 (10th Cir. 1993)]. Plaintiff's Reply, at 7:4-5.

Circuit's definition of "privacy" in United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 n.5 (3rd Cir. 1980) (quoting Fried, Privacy, 77 Yale L.J. 475, 483 (1968)), as "control over knowledge about oneself." Plaintiff argues that the Supreme Court agreed with this definition in United States Department of Justice v. Reporters Committee, 489 U.S. 749, 762-63 (1989), when it stated: "To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." The Court in Reporters Committee also stated:

> "As we have pointed out before, '[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests, One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'"

Id. at 762 (citation omitted).

However, neither this passage nor footnote 5 purports to define the full contours of "privacy" as that tern is understood in the FOIA privacy exemptions. Therefore, Plaintiff's argument that all of the foregoing authority is contrary to Supreme Court precedent must be rejected. While the courts in New York Times, Badhwar, Dow Jones, Hale and Katz may have extended the definition of "privacy" in exempting their respective documents from disclosure, these extensions did not occur in the face of contrary Supreme Court precedent. The Court finds this collection of cases to be persuasive, and therefore finds that Foster's surviving family members possess personal privacy interests that could be infringed by the disclosure of the 11 photographs still at issue.

Accordingly, the OIC's assertion of Exemption (b)(7)(C) does not fail for lack of a privacy interest.

2. Public Interest in Disclosure

Plaintiff argues that, even if the surviving family members have a privacy interest in the nondisclosure of the 11 photographs, this privacy interest is outweighed by the public interest in their disclosure. In determining the applicability of Exemption (b)(7)(C), the Court must balance the public interest in disclosure against the possible invasion of privacy caused by the disclosure. Reporters Committee, 489 U.S. at 776; Schiffer v. Federal Bureau of Investigation, 78 F.3d 1405, 1409 (9th Cir. 1996). The government bears the burden of establishing that privacy interests outweigh the public's interest in disclosure, Schiffer. 78 F.3d at 1409-1410.

Defendant claims that Plaintiff has not established that a public interest in disclosure exists. Defendant correctly notes that a public interest cognizable under FOIA is informing the citizenry about how the government is performing its statutory duties. Defendant's Reply, at 13:8-10 (citing Reporter's Committee, 489 U.S. at 733). See also Hunt v. Federal Bureau of Investigation, 972 F.2d 286, 289-90 (9th Cir. 1992) (discussing the "public interest in ensuring the integrity and the reliability of government investigation procedures"). Defendant argues that none of the 11 photographs at issue have any bearing upon how Vincent Foster performed his duties as Deputy Counsel to the President. Defendant's Reply, at 13:11-13. From this, Defendant argues that Plaintiff merely demonstrates "curiosity" in the photographs, not a cognizable public interest.

However, it is clear that the public interest Plaintiff attempts to identify is not a concern for how Vincent Foster performed his duties. Rather, Plaintiff's concerns

appear to be for the circumstances surrounding Foster's death and for the OIC's investigation of that death. Pages 9-33 of Plaintiff's Motion for Summary Adjudication attack the government investigations of Foster's death (as conducted by Independent Counsels Robert Fiske and Kenneth Star) as "grossly incomplete and untrustworthy." These pages attempt to raise several questions, contradictions, and inconsistencies with regard to what the public was told regarding: (1) the extent of Foster's injuries; (2) the statements made by Starr's [sic] family regarding the gun allegedly found in Foster's hand; (2) [sic] the condition of Foster's body as it was found; (4) the condition and location of Foster's eyeglasses; (5) the circumstances surrounding Foster's autopsy; and (6) the condition of the death scene. Plaintiff's Motion, at 9-33. Plaintiff's allegations question the manner in which the OIC investigated Foster's death and implicitly question the manner in which Foster died as well. Thus, the public interest asserted by Plaintiff clearly involves the question of how the OIC performed its statutory duties, not how Vincent Foster performed his duties.

3. Balancing the Privacy Interest with the Public Interest in Disclosure

The issue remains, however, of whether the privacy interests of Foster's family members outweigh the interest in ensuring the integrity and reliability of the OIC's investigation procedures. There is no doubt that the public interest in ensuring that the OIC conducted a proper and thorough investigation is substantial. However, this interest is lessened because of the exhaustive investigation that has already occurred regarding Foster's death. Five government inquiries have determined that Vincent Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993. The United States Park Police initially investigated the death and conducted another investigation

under the direction of Independent Counsel Robert Fiske. Report on the Death of Vincent W. Foster, Jr., By the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association ("Exhibit A to Defendant's Opposition") at 2. Congress conducted two inquiries which reached the same conclusion. Id. Finally, the OIC reached the same conclusion in its report that was recently ordered to be released to the public. Id. at 114. In addition to these investigations. Foster's death has been subject to intense media scrutiny, as evidenced by the several news sources mentioned by both parties in their briefing. For these reasons, the public interest in investigation of Foster's death is not as strong as it was prior to the extensive examination it has already received.

Additionally, the Court is not convinced that the disclosure of these 11 photographs will serve the asserted public interest. Plaintiff has not sufficiently explained how the disclosure of these photographs will advance his investigation into Foster's death. Nor has he sufficiently explained how the disclosure of these photographs will illuminate any deficiencies of the 01C investigation. Due to this uncertainty and the extensive investigation of this affair that has already occurred, the Court finds that the privacy interests of the Foster family members outweigh the public interest in disclosure. See Katz, 862 F.Supp. 484-486 (finding that the Kennedy family members' interests in preventing the disclosure of President Kennedy's autopsy photos and x-rays outweighed the public interest in their disclosure, because, *inter alia,* "the records had already been reviewed by a number of government entities and private researchers"); New York Times, 82 F.Supp. at 633 (finding that the Challenger families' privacy interest outweighed the public interest in disclosure).

Based on the foregoing, the Court finds that summary judgment is appropriate in favor of the OIC, with one

exception. The Court finds that the privacy interests in the nondisclosure of the photograph of Foster's eyeglasses are not as strong as the privacy interests in the nondisclosure of the other ten photographs. Thus, the balancing tips in favor of the public interests with regard to this photograph, Accordingly, the OIC is required to produce the photograph of Foster's eyeglasses within 90 days.

C. Photographs Already Produced: Color Copies

With regard to the photographs that have been released, Plaintiff objects to the OIC's "redaction of the color from the photographs." Plaintiff argues that he originally requested color copies of the photographs, but has received only black and white copies. Plaintiff argues that the OIC has not cited and cannot cite any FOIA exemption which allows it to redact the color from these photographs.

Defendant counters that it is not required to provide color copies of color photographs, Defendant argues that the version of FOIA that was effective at the time of Plaintiff's request requires only that agencies make records promptly available upon a proper request. 5 U.S.C. § 552(a)(3). Defendant argues that § 552 at that time did not impose a requirement of providing color copies of color photographs. Defendant claims that Plaintiff was provided with the best photocopy available.

However, a new subsection of § 552 became effective in April of 1997. That subsection states: "In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). Since this subsection was effective in January of 1998, when the OIC made records available

to Plaintiff, it applies to the OIC's disclosures. Therefore, the issue becomes whether color copies of color photographs are "easily reproducible" by the OIC.

The OIC argues that it is not equipped to make color photocopies and therefore cannot do so without undue burden and interference with its investigatory mandates. The OIC also argues that either engaging an outside contractor to make color copies or allowing plaintiff to make color copies himself would burden the OIC and expose it to the significant risk of leakage of sensitive, non-public material pertaining to its pending criminal investigations, Defendant's Opposition, at 19 n.10.

The problem with this argument is that Plaintiff has offered to pay "the costs of providing the OIC with the appropriate equipment to make suitable copies under circumstances consistent, with the OIC's security needs." Plaintiff's Reply, at 18:12-13. Plaintiff suggests that this offer extends to paying the bill of any source of equipment and personnel that the OIC trusts. *Id.* at 18:13-15. In light of this offer of accommodation, it is difficult to understand how making copies with a color copier in the OIC's offices creates any more of an "undue burden" than doing so with the OIC's own black and white copier. As for the risk of leakage, the court does not believe that this risk would be enhanced by a single delivery of a piece of office equipment. In footnote 8 of its Reply, the OIC claims that the Court is to "accord substantial weight to any agency's determination as to . . . reproducibility under [§ 552(a)(3)(B)]." 5 U.S.C. § 552(a)(4)(B). Even with this deference in mind, the Court cannot accept the arguments advanced by Defendant. Consequently, the Court finds that color copies are "readily reproducible," and therefore must be provided to Plaintiff within 90 days.

IT IS SO ORDERED.

DECLARATION OF
LISA FOSTER MOODY

My name is Lisa Foster Moody. I was married to Vincent W. Foster, Jr. for 25 years until he committee suicide on July 20, 1993.

His death and the manner in which he died totally devastated our family. Having to deal with all the media attention was incredibly difficult. Indeed, there have been telephone calls from the press and reporters knocking on my door as recently as last summer. If these photographs are released, we will again be thrust in the public eye and forced to endure the pain and invasion of privacy all over again.

There have been five major investigations of Vince's death -- by the Park Police, by two independent counsels, Robert Fiske and Kenneth Starr, and by two congressional committees chaired by Rep. Clinger and Sen. D'Amato. I personally appeared for interviews in Washington D. C. for three of these investigations. My children, Vincent III, Laura and Brugh, also flew to Washington from Little Rock to be questioned individually by Kenneth Starr, his team of investigators and several FBI agents. All of these investigations ended with the same conclusion that Vince committed suicide. The family cooperated fully with these investigations. From the moment I was told that he had killed himself, I have never had any doubts about his suicide.

Now that the investigations are concluded, my family is in the process of healing and restoring our lives to some degree of normalcy. I have remarried and my husband and I are seeking to meld our families into one. We do not need the set back that release of the photos would cause and frankly we do not deserve it. We have generally dealt with our grief in

private and have declined all of the many requests for television interviews. The privacy we have sought to maintain has been our salvation. I beg the Court not to destroy what we have worked so hard to accomplish by releasing graphic photographs of Vince in response to what we consider a cruel, insensitive request that we believe is unsupported by any valid public interest.

I did not even open Vince's casket for fear of seeing slim distorted by the autopsy. I surely cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him, coupled with the indignity of the whole world's viewing these pictures in tabloids or on the Internet. My understanding of the photographs is that all of them would be extremely upsetting to the family and cause us no end of pair and sorrow. The shock of seeing the picture of Vince on the television with the gun in his hand is still a horrifying memory for me. It is inconceivable to me how The misguided, twisted curiosity of a stranger could justify my children having to see pictures of their dead father on the nightly news, on the Internet and on the supermarket shelves.

I respectfully implore the Court to be sensitive to the wishes of the members of our family and our wholly-legitimate privacy concerns and to reconsider-releasing these photographs.

_____

Lisa Foster Moody

Executed in Little Rock, Arkansas, this 26th day of January,2001.

DECLARATION OF
SHEILA FOSTER ANTHONY

I am the sister of Vincent Foster who took his life on July 20, 1993. I have read the Court's January 12, 2001 decision and order in Allan J. Favish v. Office of Independent Counsel, CV 97-1478-WDK, listing the photographs it intends to release. More than ever before, I fervently believe that releasing any photographs depicting Vince's body post-mortem would constitute a painful unwarranted invasion of my privacy, my mother's privacy, my sister's privacy, and the privacy of Lisa Foster Moody (Vince's widow), her three children, and other members of the Foster family.

Our family has suffered a great loss under extremely tragic circumstances, compounded by the barrage of, newspaper, magazine, and Internet articles, books, and television programs and reports that followed Vince's death. An intensely private matter drew national attention. Reporters, as well as simply curious individuals, harassed my grieving family in unbelievably insensitive ways. Conspiracy theorists imagined and caused to be printed and published all sorts of wild and unsubstantiated stories, alleging murder, treason, Swiss Bank accounts, high-level and widespread cover-up of government wrongdoing, and other such ravings. Political and commercial opportunists used Vince's death to publish films and articles through media of tabloids, video, and on the Internet to speculate about and sensationalize his tragic suicide and to profit from it. Seemingly countless official investigations of his death ensued, and my sister and I. as well as Vince's wife and children, were called before government agents to be interviewed and to testify about, and painfully re-live, the events surrounding his death. My now 86 year old mother and my sister received middle-of-the-night calls from authors pretending to be Vince's friend and seeking any personal tidbit of information about Vince from them. We found flowers on his grave with handwritten notes from

strangers asserting that he had been murdered. I was sent a book authored by a conspiracy theorist who stated that Vince had been murdered and warned that my life could be in danger.

Our family was horrified and devastated by the photograph leaked to the press and published on a national television network and in newspapers of Vince's dear dead hand holding the gun he used to kill himself. That photograph has been shown in national media again and again, and every time I see it I have nightmares and heartpounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life. My mother has suffered unimaginable sorrow and depression in losing her only son, but her grief (and ours) has been compounded by the fear that she will see upsetting reports, about him on her television set or see headlines and photographs in the tabloids on the grocery store racks where she shops. It is my ardent desire to protect my family as well as myself from additional torment which would result from the release of these graphic photographs.

I fear that the release of these photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage. I cannot adequately express how truly unjust, unfair and cruel it would be to subject my family to more public scrutiny and the dissemination of these photographs via the Internet or by other print and electronic media. Although I have struggled to read the description of the photographs at issue here, I could not bring myself to view them. The horror of actually seeing Vince's dead body and bloody face and shirt would undoubtedly cause

me extreme mental anguish. No member of my family should ever be concerned with the possible exposure of photographs of this nature.

The death of my brother has been more than adequately investigated. Five separate government inquiries have determined that Vince's death was a result of a self-inflicted gun wound. Therefore, I cannot fathom a legitimate or rational reason why these photographs should be released. The mere suggestion that these photographs would be released is unconscionable. Their release would only bring more agony to my family.

We have endured enough pain and personal invasion by the media and by those who investigated the death of my brother. While I have tried here, I have no adequate words to express the anguish the release of these photographs would bring to me and the entire Foster family.

The Government has asked the Court to uphold its position that the release of the photographs would be an unwarranted invasion of my personal privacy and that of Vince's family. I implore the Court to do all it can to protect our family, but particularly Vince's children and his 86 year old mother, from further invasion and the distressing events that surely would result from the release of these photographs. Indeed, I beg the Court to place these photographs under permanent seal so that we will not continually, in forum after forum, be required to hire legal counsel and make these requests to the courts.

I declare that the foregoing is true.

_____

Sheila Foster Anthony.

Executed in Washington, D.C., this 24th day of January, 2001.

Supreme Court, U.S.
FILED
DEC 20 2002
CLERK

No. 02-599

In the Supreme Court of the United States

SHEILA FOSTER ANTHONY AND
LISA FOSTER MOODY, PETITIONERS

v.

ALLAN J. FAVISH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

The Freedom of Information Act's Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The questions presented by the petition are:

1. Whether the court of appeals correctly held that a FOIA requester need not offer evidence to support his assertion that release of law enforcement records is necessary to vindicate a public interest in determining whether there was government misconduct, and that, if the requester offers such evidence, the court does not have to weigh it.

2. Whether the court of appeals erred in ordering release of photographs without finding a nexus between the specific photographs and the public interest alleged to justify their release.

3. Whether the court of appeals correctly held that public release of law enforcement records that are not "graphic, explicit, and extremely upsetting" would not invade the survivors' privacy.

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In the Supreme Court of the United States

No. 02-599

SHEILA FOSTER ANTHONY AND
LISA FOSTER MOODY, PETITIONERS

v.

ALLAN J. FAVISH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but it is *reprinted in* 37 Fed. Appx. 863. A prior opinion by the court of appeals in this case (Pet. App. 8-44) is reported at 217 F.3d 1168. The orders of the district court (Pet. App. 5-7, 45-58) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 6, 2002. Petitions for rehearing were denied on August 16, 2002 (Pet. App. 4). The petition for a writ of certiorari was filed on October 16, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, exempts a variety of categories of information from the government's general duty of disclosure. One such category, described in FOIA Exemption 7(C), consists of "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

2. This FOIA suit arises from the July 1993 suicide of Deputy White House Counsel Vincent Foster. Foster was found dead in Fort Marcy Park in McLean, Virginia. The United States Park Police conducted the initial investigation of Foster's death and took color photographs of the death scene, including ten pictures of Foster's body. Investigations by the Park Police, the FBI, and congressional committees in both the House of Representatives and Senate concluded that Foster committed suicide. Pet. App. 9, 28-30.

The Office of Independent Counsel twice investigated Foster's death, first through Independent Counsel Robert Fiske, Jr., and later through Independent Counsel Kenneth Starr. Pet. App. 9, 28-30. Mr. Fiske issued a 58-page report concluding that the "overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide." *Id.* at 28 (citation omitted). Three years later, Mr. Starr filed a 114-page report that concurred with the conclusion of every other investigation, explaining that "[t]he available evidence points clearly to suicide as the manner of death." *Id.* at 31 (citation omitted).

3. A public-interest group, Accuracy in Media, filed a FOIA request with the Park Police seeking the autopsy photographs and death-scene photographs of

Foster's body. The government declined to provide the photographs. The Court of Appeals for the District of Columbia Circuit sustained that decision, holding that the photographs are exempt from mandatory disclosure under FOIA Exemption 7(C). *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000).

4. Respondent Allan Favish, who was an attorney for Accuracy in Media in the D.C. Circuit case filed his own FOIA request for the ten death-scene photographs, seeking them from the Office of Independent Counsel. The Office withheld them under Exemption 7(C). Favish filed suit in the Central District of California. The district court initially sustained the government's invocation of Exemption 7(C). Pet. App. 45-58.

A divided Court of Appeals for the Ninth Circuit reversed and remanded the case. Pet. App. 8-44. The court agreed with every other circuit court to address the question that "the personal privacy in the statutory exemption [Exemption 7(C)] extends to the memory of the deceased held by those tied closely to the deceased by blood or love." *Id.* at 16. The court noted that the Office of Independent Counsel had represented to the court "that the 10 withheld photographs are 'graphic, explicit, and extremely upsetting,'" but the court expressed the view that one of the photographs at issue here, which had been published by *Time* magazine and showed a gun in Foster's hand, did not meet that description. *Id.* at 17. The court then remanded the case for the district court to review the photographs *in camera* and balance "the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." *Ibid.*

Judge Pregerson agreed with the majority that Exemption 7(C) protects the privacy interests of surviving family members, Pet. App. 18, but filed a lengthy dissent disagreeing with the majority's remand of the case and its analysis of the asserted public interest in disclosure, *id.* at 18-44. He reasoned that the government's *Vaughn* index[1] was sufficiently comprehensive to make a remand for *in camera* review of the photographs unnecessary, *id.* at 25, and that the "pain and anguish" that Favish concedes petitioners would suffer, *id.* at 36, outweighs the public interest in obtaining the photographs to facilitate a sixth investigation into the cause of Foster's death, *id.* at 39-43.

5. On remand, the district court construed the court of appeals' opinion as permitting the withholding under Exemption 7(C) of only those photographs that are "graphic, explicit and extremely upsetting." Pet. App. 5 (citation omitted). The district court ordered release of five of the ten photographs, including the photograph that had been published in *Time* magazine.

6. The government appealed, and petitioners (the widow and sister of Vincent Foster) intervened on appeal. In a one-sentence, unpublished disposition, the court of appeals affirmed the district court's judgment insofar as it sustained the withholding of five of the photographs and required the release of four others. Pet. App. 2-3. The court held, however, that one photograph ordered released by the district court had been properly withheld by the Office of Independent Counsel. *Ibid.* Judge Pregerson dissented on the ground that the nine "never-before-released" photographs were properly withheld under Exemption 7(C). *Id.* at

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[1] See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

3.[2] The court of appeals denied petitioners' and the government's petitions for rehearing and for rehearing en banc. Judge Pregerson would have granted panel rehearing. *Id.* at 4.

DISCUSSION

1. With respect to the matters covered by the first two questions presented by the petition, the government has filed its own petition for a writ of certiorari seeking review of the Ninth Circuit's decision in this case. *Office of Indep. Counsel* v. *Favish* (filed Dec. 20, 2002). The government argues that its petition should be held pending this Court's decision in *United States Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms [ATF]* v. *City of Chicago*, cert. granted, No. 02-322 (Nov. 12, 2002), which also involves the interpretation and application of FOIA Exemption 7(C), and then be disposed of as appropriate in light of the Court's decision in that case. For the same reasons, this petition for a writ of certiorari should also be held pending the Court's decision in *ATF* v. *City of Chicago*.

2. Petitioners also seek (Pet. 14-17) this Court's review of what they assert was the Ninth Circuit's holding that materials sought under FOIA must be "graphic, explicit, and extremely upsetting" before Exemption 7(C) will protect surviving family members' privacy interests, Pet. 14. That question does not warrant plenary review by this Court. Nowhere in the court of appeals' opinions did it hold that only "graphic, explicit, and extremely upsetting" materials may be protected under Exemption 7(C), either generally or in the particular context of survivor privacy claims. To

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[2] Judge Pregerson agreed with the ordered release of the one photograph published by *Time* magazine. Pet. App. 3.

the contrary, in recognizing a survivor right of privacy, the court of appeals stated in its original published opinion that "the expectable invasion" of "the memory of the deceased" would be balanced against the public interest in disclosure. Pet. App. 16. On that same page, the court again stated that disclosures that "violate that memory" of the deceased loved one invade the survivor's protected privacy interests. *Ibid.*

It was not until the next section of the Ninth Circuit's first opinion, when the court discussed the balancing of that *recognized* privacy interest against the asserted public interest in disclosure that the phrase "graphic, explicit, and extremely upsetting" appears in the opinion. Pet. App. 17. But even then the phrase was not of the court's own making; it was quoted from the argument of the Office of Independent Counsel: "The OIC represents that the 10 withheld photographs are 'graphic, explicit, and extremely upsetting.'" *Ibid.* The court of appeals never indicated that the Office of Independent Counsel's description of the photographs was anything more than that: a description.

Petitioners are correct (see Pet. 14) that the district court, on remand, said that "the appellate court appears to have defined the zone of privacy protection as those photographs that are 'graphic, explicit, and extremely upsetting.'" Pet. App. 5. But that single, non-precedential understanding of a court of appeals opinion by a district court does not amount to the type of entrenched inter-circuit conflict meriting this Court's review. Nor is the court of appeals' one-sentence, unexplained, and unpublished per curiam decision affirming the district court's judgment requiring release of the four photographs at issue here sufficient to transform purely descriptive language in the court of appeals' prior opinion into binding Ninth Circuit precedent.

The Ninth Circuit's decision therefore does not warrant review by the Court on that ground. Nonetheless, if this Court, following its decision in *ATF* v. *City of Chicago*, *supra*, grants the petition for a writ of certiorari in this case, vacates the judgment of the Ninth Circuit, and remands the case to the court of appeals for further consideration of the public interest side of the balance under Exemption 7(C), the Ninth Circuit will also have an opportunity to consider further the privacy side of the balance under Exemption 7(C) in this case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms* v. *City of Chicago*, No. 02-322, and then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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DECEMBER 2002

FILED
MAR 21 2003

Nos. 02-599, 02-954

IN THE

Supreme Court of the United States

SHEILA FOSTER ANTHONY, LISA FOSTER MOODY,
Petitioners

v.

ALLAN J. FAVISH, ET. AL.,
Respondents

OFFICE OF INDEPENDENT COUNSEL,
Petitioner

v.

ALLAN J. FAVISH, ET. AL.,
Respondents

On Petition for Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

FAVISH'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Ninth Circuit committed reversible error by holding that Exemption 7(C) of the Freedom of Information Act did not allow the Office of Independent Counsel to withhold four original Polaroid photographs of Deputy White House Counsel Vincent Foster's deceased body.

PARTIES TO THE PROCEEDING

The petitioners are the Office of Independent Counsel, who was the defendant below, and Sheila Foster Anthony and Lisa Foster Moody, who intervened in the district court to prevent release of the photographs. The respondent is Allan J. Favish, who was the plaintiff below, and who has filed his own petition for writ of certiorari in this case, *Allan J. Favish v. OIC, et al.*, No. 02-409.

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FAVISH'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Allan J. Favish filed a lawsuit under the FOIA against Petitioner Office of Independent Counsel ("OIC") to obtain certain original photographs taken in connection with the investigation of the July 20, 1993 death of Deputy White House Counsel Vincent Foster ("Foster"). The OIC withheld photographs of Foster's body taken in Virginia's Fort Marcy Park on the basis of the "personal privacy" exemption in the FOIA, 5 U.S.C. § 552(b)(7)(C).

Later, Petitioners Sheila Foster Anthony and Lisa Foster Moody ("intervenors") intervened in the district court to prevent release of the photographs.

The district court entered its first summary judgment against Favish March 11, 1998, without viewing the original photographs in camera. Intervenors' Appendix., 45.

On July 12, 2000, in deciding the first appeal in this case, the Ninth Circuit reversed and remanded, and ordered the district court to view the photographs in camera. Intervenors' App., 8. Based on its interpretation of the FOIA's "personal privacy" exemption (5 U.S.C. § 552(b)(7)(C)), the Ninth Circuit ordered the district court to balance the "public purpose to be served by disclosure" against the degree to which disclosure would "violate" the "memory of the deceased loved one" held by "a spouse, a parent, a child, a brother or a sister" or constitute an "invasion" of "the survivor's memory of the beloved dead." Intervenors' App., 16. The Ninth Circuit stated: "The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead." Intervenors' App., 16. The Ninth Circuit also stated that the district court was to "balance the effect of their release on the privacy of the

Foster family against the public benefit to be obtained by their release." Intervenors' App., 17.

Applying the Ninth Circuit's interpretation of the "personal privacy" exemption, on January 12, 2001, the district court entered a summary judgment ordering the OIC to release five of the ten disputed photographs and allowing the OIC to withhold the other five. Intervenors' App., 5.

On June 6, 2002, without discussion, the Ninth Circuit affirmed the summary judgment, except that it ordered an additional photograph withheld. Intervenors' App., 1. Contrary to intervenors' statement that the Ninth Circuit did this "[a]fter in camera review of the photographs,"[1] there is nothing in the record establishing that the original photographs were delivered to the Ninth Circuit, only copies.

On August 16, 2002, the Ninth Circuit denied the OIC's and the intervenors' petitions for rehearing and suggestions for rehearing en banc. Intervenors' App., 4.

REASONS FOR DENYING THE WRITS

1. The Intervenors' Arguments Do Not Justify Granting Their Petition.

A. The D.C. Circuit's Use Of An Incorrect Standard Does Not Justify Granting The Intervenors' Petition.

The intervenors state that there are "three issues under the FOIA privacy exemption" raised by the Ninth Circuit's opinion that warrant granting of their petition.[2] The first of these is that the Ninth Circuit and the D.C. Circuit have different standards for evaluating the public interest under Exemption 7(C).[3] The D.C. Circuit stated in *Accuracy in Media v. National Park Service*:

> To show that the invasion of privacy was not "unwarranted," AIM must show "compelling evidence that the agency denying the FOIA

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[1] Intervenors' Petition for Writ of Certiorari 6 ("Intervenors' Pet.").

[2] Intervenors' Pet. 6-8.

[3] Intervenors' Pet. 6-7.

> request is engaged in illegal activity, and access to the [photos] is necessary in order to confirm or refute that evidence."[4]

That is not the standard in the Ninth Circuit and it is an improper standard. Exemption 7(C) states that disclosure may be denied when it would lead to an "unwarranted" invasion of personal privacy. The exemption does not say anything about having to produce "compelling evidence" in order to make the invasion "warranted" or that it must be evidence of "illegal activity" in order to make the invasion "warranted." This Court has held that the FOIA's exemptions must be narrowly construed to promote the FOIA's purpose of government disclosure.[5]

By imposing the additional burdens of "compelling evidence" and "illegal activity" for those trying to show that the public interest in disclosure of a particular document is paramount to the privacy interest of a single person or a few persons, the D.C. Circuit gave the privacy exemption a broad construction that has no basis in the statutory language or Congressional intent. The D.C. Circuit never explained how its standard is consistent with the FOIA as interpreted by this Court. For example, why require evidence of illegal activity when the public also has an interest in discovering negligent government activity?

The Ninth Circuit did not err by failing to impose the erroneous standard used by the D.C. Circuit in *AIM*. The D.C. Circuit's improper standard was a good reason for this Court to have granted certiorari in *AIM*, but it did not do so. The Ninth Circuit's obedience to the FOIA in this regard does not provide a good reason for this Court to grant the

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[4] *AIM*, 194 F.3d 120, 124 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000).

[5] *Van Bourg, Allen, Weinberg & Roger v. National Labor Relations Board*, 751 F.2d 982, 984 (9th Cir. 1985) (citing *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-361, 96 S.Ct. 1592, 1598-99, 48 L.Ed.2d 11 (1976)).

intervenors' petition. The best time to grant certiorari over this issue is when the D.C. Circuit or some other Circuit imposes this erroneous standard again.

Moreover, the intervenors have jumbled cases together that do not use this erroneous standard with those cases that do.[6] Cases holding that a "general interest"[7] in finding the truth, or "mere speculation"[8] or a "broad unsupported statement of possible neglect,"[9] or "merely stating that [a public] interest exists in the abstract,"[10] or "broad unsupported hints of a government coverup"[11] are insufficient, are not the same as cases requiring "compelling evidence" of "illegal activity."

The Ninth Circuit's decision was not based on a general interest in finding the truth or mere speculation or an unsupported statement of possible neglect or anything similar. Rather, the Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[12] Although the Ninth Circuit stated "if believed," it should be emphasized that none of the evidence depends upon Favish's credibility because the evidence consists almost entirely of the government's own documents. Contrary to the intervenors' statement that Favish is "a conspiracy theorist,"[13] compelling evidence was presented to the district court and to the Ninth Circuit establishing that the

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[6] Intervenors' Pet. 9-11.

[7] *See e.g., Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987).

[8] *See e.g., Department of State v. Ray*, 502 U.S. 164, 179 (1991).

[9] *See e.g., KTVY-TV v. United States*, 919 F.2d 1465, 1470 (10th Cir. 1990).

[10] *See e.g., Halloran v. Veterans Admin.*, 874 F.2d 315, 323 (5th Cir. 1989).

[11] *See e.g., Miller v. Bell*, 661 F.2d 623, 630 (7th Cir. 1981).

[12] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[13] Intervenors' Pet. 2.

OIC's reports about Foster's death are untrustworthy and deceptive. The OIC was unable to prove that Favish distorted the evidence and unable to provide plausible answers to the questions raised that would diminish the public's interest in disclosure of the photographs.

B. The Ninth Circuit Required A Nexus Between The Public Interest And The Specific Photographs.

The intervenors state that the Ninth Circuit "fail[ed] to require a nexus between the photographs it ordered released and the alleged public interest . . . ."[14] This is false. The Ninth Circuit ordered the district court to "examine the photos in camera and to balance the effect of their release on the privacy of the Foster family against *the public benefit to be obtained by their release.*"[15] The phrase "their release" refers to the subject photographs. Therefore, the Ninth Circuit did not abandon a connection between the subject photographs and their ability to serve the purpose of the FOIA, namely, "to shed light 'on an agency's performance of its statutory duties."[16]

The intervenors then make a factual argument, citing dissenting Judge Pregerson, that "with one exception, the photographs would shed no light on any of the claimed inconsistencies in the Report."[17]

However, the factual issue of what the photographs would reveal about how the OIC performed its job is not a sufficient basis for the intervenors' petition. Supreme Court Rule 10 states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . ." Therefore, even if Judges Noonan and

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[14] Intervenors' Pet. 13.

[15] *Favish*, 217 F.3d at 1174 (emphasis added).

[16] *Id.* at 1171 (*quoting United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-73, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)).

[17] Intervenors' Pet. 12.

O'Scanlain made an erroneous factual finding about what the photographs reveal, that should not be grounds for granting the intervenors' petition.

Additionally, the intervenors' factual argument is entirely based on Judge Pregerson's dissenting opinion and characterization of the evidence,[18] not the evidence. The intervenors are asking this Court to share its view that Judge Pregerson's dissenting opinion was a factually accurate, fair and logical presentation of the factual issues raised by Favish. In fact, Judge Pregerson's opinion was so deficient that Judge's Noonan and O'Scanlain did not join in it. The intervenors have failed to establish that Judge's Noonan and O'Scanlain made any factual error regarding what the photographs reveal about how the OIC conducted its job.

The intervenors take an unduly crabbed view of the public's interest in seeing the four photographs ordered released. The intervenors made it sound as if the only reason to see the photos is to examine "the location of Mr. Foster's entrance and exit wounds."[19]

In fact, the reason the public needs to see these photos is that the government's presentation of the evidence in its reports is demonstrably untrustworthy and deceptive. The government destroyed its own credibility with regard to this case. The photos may or may not reveal information contradicting the suicide story. The point however, is that the public must be allowed to make that determination for itself in the face of untrustworthy government reports.

The intervenors argue as if there is no relationship between the four photos ordered released and the public's interest in evaluating how the OIC did its job.[20] However, there is such a relationship. Although the Ninth Circuit and the district court did not articulate that relationship, that

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[18] Intervenors' Pet. 12-13.

[19] Intervenors' Pet. 12; *see also id.* 13.

[20] Intervenors' Pet. 12-14.

relationship was in the record before both courts, and presumably was taken into account by them.

i. The Leaked Gun-In-Hand Photo.

The district court ordered that the photo entitled "1 – Right hand showing gun & thumb in guard" should be released.[21] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

The original of this photo is important because there is controversy about why the gun would have remained in Foster's hand had he shot himself. Both Fiske and Starr said that the gun remained in his hand because Foster's thumb was trapped and compressed between the trigger and the trigger guard of the gun.[22] The publicly available "leaked" copy of the photo is too degraded to make a definitive evaluation of whether Foster's thumb was extended through the trigger area past the joint on his thumb to cause the gun to stay in his hand. The original of this photo would provide a much better view of his thumb and the trigger area.

Also, common sense tells us that the explosion of supersonic gasses from a .38 high velocity gunshot into the mouth is likely to cause a "blowback" of blood and other organic matter out of the mouth and onto Foster's gun, hand and sleeve. Indeed, Starr quotes Dr. Henry Lee as saying that he examined the photos taken at the park and found "blood spatters" on Foster's hands and shirt.[23] Starr quotes Lee as saying that this "backspatter" is typical.[24] The original photo will allow the public to see if there is any such backspatter.

There also is a question about why the gun appears to be partially lodged under Foster's leg. If he shot himself with that gun while sitting on the ground, how did it get under his leg? The original photo will provide a more detailed view

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[21] Excerpts of Record 410 (filed in appeal 2, May 30, 2001) ("ER"). The photo is at ER 178 & 179.
[22] ER 610-611, 616, 620.
[23] ER 616, 621.
[24] ER 616, 621.

and allow a better evaluation of whether the gun is lodged under his leg.

Although the degraded public version of the photo was not officially released, the fact remains that any privacy interest in the original is virtually nil because ABC, Time and Newsweek have given the public version far greater exposure than Favish could ever give any version he might receive.

ii. The Photograph Entitled "5 – VF's body – focusing on the Rt. side shoulder/arm".

The district court ordered that the photo entitled "5 – VF's body – focusing on the Rt. side shoulder/arm" should be released.[25] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

In its motion to alter the judgment, the OIC stated that this photo shows "blood stains and/or blood . . . ."[26] This photo also may help solve the mystery about blood flow patterns and an alleged neck wound that officially did not exist.

As Starr stated, paramedic Richard Arthur, "initially said he saw what 'appeared to be a bullet wound, an entrance wound' on the neck."[27] Unstated by Starr is that Arthur testified he was 2-3 feet away from Foster when he observed the apparent bullet neck wound on the right side of Foster's neck, around the jaw line and underneath the right ear.[28] But, citing a nonpublic FBI report, Starr said that Arthur told the FBI in 1996 that autopsy photos Arthur examined were taken from a better angle and a better view than what he had at the park and he may have been mistaken about such a wound.[29]

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[25] ER 409.
[26] ER 482.
[27] ER 277, 314-15.
[28] ER 119-20, 122-23.
[29] ER 277, 314-15.

The alleged neck wound also is discussed in two books by major United States publishers.[30] These books allege a story of illegal conduct by members of the OIC and the FBI in trying to prevent proper enlargement and examination of the pristine original of at least one of the six Polaroid photographs not ordered released.[31] Allegedly, this was done to conceal a neck wound that officially did not exist.[32] The books allege an effort to illegally obstruct the work of Assistant United States Attorney Miquel Rodriguez and his former assistant Lucia Rambusch while they were working on the Foster death investigation at the OIC.[33] One of the authors of the two books, Ambrose Evans-Pritchard, stated in a declaration, "I have seen the photograph showing an apparent neck wound to Foster's neck . . . ."[34]

It is undisputed that one of Starr's experts reported seeing dried blood on Foster's neck in an autopsy photo, supposedly taken after the body was washed, and the location of that dried blood coincided with the location of the alleged neck wound reportedly seen by a paramedic at the park and visible in an enhanced copy of the original photo.[35]

Moreover, Starr discussed blood draining from Foster's "right nostril" and "right side of the mouth."[36] Starr stated

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[30] ER 423-430 (Christopher Ruddy, The Strange Death of Vincent Foster: An Investigation 163-165 (The Free Press, a division of Simon & Schuster, Inc., 1997)); ER 423, 431-453 (Ambrose Evans-Pritchard, The Secret Life of Bill Clinton: The Unreported Stories 135-153 (Regnery Publishing, Inc., 1997)).

[31] *Id.*

[32] *Id.*

[33] *Id.* The district court denied Favish's motion to take the testimony of Rodriguez and Rambusch on the issue of the authenticity of the photos being shown to the district court. ER 209, 220-226, 411-473, 713. The Ninth Circuit was asked to reverse that ruling (Opening Brief of Appellant at 4-6, 46-57 (filed in appeal 2, May 30, 2001), but affirmed it without commenting on the ruling. Intervenors' App. 1.

[34] ER 601, 656, 662.

[35] ER 277, 345.

[36] ER 277, 345.

that many witnesses who saw Foster at the scene described his head as "facing virtually straight, not tilting noticeably to one side or the other."[37] Starr also discussed "a blood transfer stain in the area of the right side of the face" that Dr. Lee allegedly concluded was made when Foster's "head made contact with the right shoulder at some point before the Polaroids were taken,"[38] thereby causing a blood stain to transfer from Foster's shoulder to his cheek. Starr was unable to explain how this happened and could only speculate about who might have moved Foster's head because none of the Park Police or paramedics who were among the first to see Foster's body at the scene stated that they moved Foster's head.[39] Neither Fiske or Starr was able to definitively state how Foster's head made contact with his right shoulder and then returned to a straight-up position to leave the transfer stain on his cheek. Starr implied that the blood on Foster's right shoulder came from the blood draining from the nostril and mouth.[40] Thus Starr implied that the blood draining from the nostril and mouth came first and then stained the shoulder, and then the transfer stain was made on the cheek *over* the blood trail from the nostril and mouth.

However, more recently released evidence from Dr. Lee's report for Starr demonstrates that Starr's implied scenario did not happen. The new evidence raises questions about whether the head was moved more than once and whether the blood on the shoulder initially came from a neck wound, not the mouth, and whether somebody tried to conceal the blood flow from the neck by tilting the head to spill blood from the mouth over the right side of the neck.

According to Lee's report: "A portion of the blood trail from Mr. Foster's mouth appears to have been deposited on

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[37] ER 347.
[38] ER 277, 347.
[39] ER 277, 347.
[40] ER 277, 344-347.

top of the transfer pattern after his face was separated from the shoulder region."[41] Starr failed to tell this to the public. Starr led the public to believe that blood drained from Foster's nostril and mouth and stained his shoulder. Then, Starr implies, some unknown person tilted Foster's head so that the right cheek touched the blood on the shoulder and then that person moved Foster's head off the shoulder back to the straight-up position, leaving the transfer stain on the cheek.

Starr did not tell the public that Lee stated that *after* this transfer stain was made, more blood drained from Foster's mouth. How could more blood have drained from Foster's mouth at that point, unless somebody tilted his head again? Presumably his heart had long since stopped beating and at least some of the blood had already drained from his mouth to stain the shoulder.

Starr does not tell us what caused the flow of blood out of Foster's mouth that is described by Lee as going on top of the transfer stain on Foster's cheek. Given Starr's failure to explain this second blood flow, to fit the facts reported by Lee, it appears that one has to assume that the head was moved for a second time. This second movement means that after whomever moved Foster's head the first time, someone (who presumably had no business moving the head of a man known to be dead at a possible crime scene) moved the head with the result that blood streamed down the right side of the head and onto the neck and shoulder. Therefore, we now have possible evidence for a second movement of Foster's head that Starr failed to report.

This leaves the American public in a position of having to make educated guesses with insufficient evidence about what happened. The public should not have to do that. One educated guess is that the shoulder became stained with blood that was draining from a right-side neck wound (that

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[41] ER 601, 654-655.

officially did not exist). Then some unknown person moved Foster's head, causing the right cheek to touch the bloodstained right shoulder, thereby creating the transfer stain on the right cheek, and then moved his head back to the straight-up position. Subsequently, somebody moved Foster's head for a second time to the right in order to spill some blood that was collected in the mouth out the right side of the mouth to cover the blood trail that was coming from the neck and make it appear that all the blood was originating from the mouth, and none from the neck.

Such an educated guess is consistent with something else Lee stated that Starr did not tell the public: "A pool of blood appears to be directly under the right side of his neck and shoulder region."[42] Unfortunately, the public is left to this sort of educated guessing because the government has not dealt with the public honestly. We know that Lee told Starr that the contact stain was created before the blood trail from the mouth, implying that they were caused by two separate events. We know that Starr failed to tell this to the public. We also know that neither Lee or Starr offer any explanation of how this happened.

The public must see these photos so that the public can provide the careful analysis that the government failed to provide. Perhaps the photos will show whether the amount of blood that pooled under the right side of the neck and shoulder region, as reported by Lee and concealed by Starr, is too great to have come from the mouth, thus indicating it came from the neck.

We are dealing with a mystery. By nature, we don't know all the answers. We do not know all the right questions to ask. Public release is the only way to ensure that these photos are given the scrutiny they deserve.

iii. The Photograph Entitled "4 – VF's body focusing on right side and arm".

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[42] ER 601, 654, 655.

The district court ordered that the photo entitled "4 – VF's body focusing on right side and arm" should be released.[43] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

In its motion to alter the judgment, the OIC stated that this photo shows "blood stains and/or blood . . . ."[44] This photo also may help solve the mystery about the blood flow patterns discussed above.

iv. The Photograph Entitled "5 – VF's body – focus on top of head thru heavy foliage".

The district court ordered that the photo entitled "5 – VF's body – focus on top of head thru heavy foliage" should be released.[45] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

In its motion to alter the judgment, the OIC stated that in this photo "Foster's face is clearly visible . . . ."[46] This photo also may help solve the mystery about the blood flow patterns discussed above.

C. The Ninth Circuit Did Not Create A New Universal Standard With Its "Graphic, Explicit, etc." Standard.

The intervenors argue that the Ninth Circuit and the district court's use of the phrase "graphic, explicit and extremely upsetting" constitutes a new test for determining whether a privacy interest is impacted, to be applied in all cases.[47] In so doing, the intervenors misconstrue what the Ninth Circuit and the district court did here. The district court stated: "*In this case*, the appellate court appears to have defined the zone of privacy protection as those photographs that are 'graphic, explicit and extremely upsetting.'" Intervenors' App. 5 (emphasis added). Therefore, the zone of

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[43] ER 410.
[44] ER 482.
[45] ER 410.
[46] ER 482.
[47] Intervenors' Pet. 14-17.

privacy protection was only defined for "this case" not all cases.

It must be remembered that in "this case" the Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[48] Thus, in that context, a photograph would have to meet the "graphic, explicit and extremely upsetting" standard in order to remain hidden from public view. Neither the Ninth Circuit or the district court was establishing that standard for every future case involving a claim of privacy under Exemption 7(C). Therefore, the Ninth Circuit's opinion is not inconsistent with this Court's opinion in *Reporters Committee*, as argued by the intervenors.[49]

Nor does the Ninth Circuit's use of that standard in this case, based on the facts of this case, conflict with other appellate opinions from other circuits. The different result in the D.C. Circuit's *AIM* case is based more on the judge's different analysis of the facts, rather than the Ninth Circuit's use of the "graphic, explicit and extremely upsetting" standard. Accordingly, the Ninth Circuit's use of that standard is insufficient reason for this Court to grant the intervenors' petition.

2. The OIC's Three Arguments About The Ninth Circuit's Evaluation Of The Public Interest Side Of Exemption 7(C) Balancing Do Not Justify Granting The OIC's Petition.

A. The D.C. Circuit's Use Of An Incorrect Standard Does Not Justify Granting The OIC's Petition.

The OIC states that there are "[t]hree aspects of the Ninth Circuit's evaluation of the public interest side of the

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[48] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[49] Intervenors' Pet. 16.

balance under Exemption 7(C)" that "warrant certiorari."[50] The first of these is that the Ninth Circuit and the D.C. Circuit have different standards for evaluating the public interest under Exemption 7(C).[51] For the same reasons discussed above, the D.C. Circuit's use of an incorrect standard does not justify granting the OIC's petition.

Moreover, the OIC has jumbled cases together that do not use this erroneous standard with those cases that do.[52] Cases holding that a "general interest" in finding the truth is insufficient,[53] or that impugning government reports without "a scintilla of evidence" is insufficient,[54] are not the same as cases requiring "compelling evidence" of "illegal activity."

The Ninth Circuit's decision was not based on a general interest in finding the truth or impugning government reports without a scintilla of evidence. Rather, the Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[55] Although the Ninth Circuit stated "if believed," it should be emphasized that none of the evidence depends upon Favish's credibility because the evidence consists almost entirely of the government's own documents. Contrary to the OIC's implication, this is not a case where "bald allegations of governmental misconduct"[56] were made. The OIC also states that "'speculation' alone cannot be enough under Exemption 7(C) . . . to outweigh the profound privacy interests of third

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[50] OIC Pet. 9.
[51] *Id.*
[52] OIC Pet. 9-10.
[53] *See e.g., Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987).
[54] *See e.g., Department of State v. Ray*, 502 U.S. 164, 179 (1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1470 (10th Cir. 1990).
[55] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).
[56] OIC Pet. 10.

parties in avoiding disclosure."[57] That would be a good point to make in a FOIA case that involved "speculation alone," but that is not this case.

B. The OIC's False Argument That The Photographs At Issue Reveal Nothing About The Government's Conduct Does Not Justify Granting The OIC's Petition.

The second aspect of the Ninth Circuit's evaluation of the public interest side of the balance under Exemption 7(C) raised by the OIC is that "[t]he photographs at issue here reveal nothing about the government's conduct; they reveal only visual depictions relating to the death of Vincent Foster."[58] The OIC's statement is false. The government conduct at issue is the quality of its investigation into the cause of Foster's death and the accuracy of its conclusion about that death. Photographs of Foster's body will either be consistent or inconsistent with the government's conclusion of suicide in the park. Therefore, the photographs will reveal something about the government's conduct. It is completely illogical for the OIC to state that photographs of a body that has been mysteriously shot reveal nothing about the quality of the investigation into that death. Does the OIC also believe that the photographs were completely irrelevant to the death investigation?

It is especially important in this case that the public see the raw evidence because the government's reports about the death are untrustworthy and deceptive, when compared with the publicly available raw evidence. Because the public cannot trust the government to fairly and accurately characterize the evidence in this case, the public, by definition, must see the evidence for itself.

Moreover, the factual issue of what the photographs reveal is not a sufficient basis for the OIC's petition, as stated in Supreme Court Rule 10. Additionally, the OIC

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[57] OIC Pet. 18.
[58] OIC Pet. 14.

makes the same mistake as the intervenors in relying on Judge Pregerson's dissenting opinion and characterization of the evidence,[59] not the evidence.

The OIC supports its argument with a statement that has no relevance to this case. The states: "FOIA, however, does not give the public a generalized 'right to know' personal details about private third parties that happen to be maintained in government files."[60] However, there are no "personal details" or any details about Foster's survivors in these photographs. The only person depicted in the photographs is Foster and because he is deceased, his privacy is not an issue in this case.

The OIC takes an unduly crabbed view of the public's interest in seeing the four photographs ordered released. The OIC made it sound as if the only reason to see the photos is to examine Foster's "head injuries" or "the bullet's path"[61] and the OIC argues that the four photos ordered released have no value to the public.[62] This is false, for the reasons stated above.

C. The OIC's Mischaracterization Of The Ninth Circuit's Opinion Does Not Justify Granting The OIC's Petition.

The third aspect of the Ninth Circuit's evaluation of the public interest side of the balance under Exemption 7(C) raised by the OIC is based on the OIC's mischaracterization of the Ninth Circuit's opinion. The OIC correctly quotes the Ninth Circuit as stating that "[n]othing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations."[63] The Ninth Circuit's statement is

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[59] OIC Pet. 11-14.
[60] OIC Pet. 13.
[61] OIC Pet. 14.
[62] OIC Pet. 11-14.
[63] OIC Pet. 15 (quoting *Favish*, 217 F.3d at1173).

completely true and the OIC presents no authority to contradict that statement.

Instead, the OIC mischaracterizes the Ninth Circuit's statement and then attacks the mischaracterization as if it was the Ninth Circuit's holding. The OIC mischaracterizes the Ninth Circuit's statement into the following:

> The court of appeals also erred in holding that the multiple, lengthy investigations that had already taken place and the enormous volume of materials (including photographs about Foster's death already in the public domain were completely irrelevant to evaluation of the public interest in disclosure of the particular photographs at issue here. . . . By giving no weight to the enormous volume of information already released by the government, the Ninth Circuit found the public interest requirement to be satisfied by information the disclosure of which would contribute only marginally, if at all, to public understanding.[64]

Contrary to the OIC's mischaracterization, the Ninth Circuit did not state that the government's reports and publicly available evidence about the death were "completely irrelevant to evaluation of the public interest" in this case. Nor did the Ninth Circuit give "no weight" to those reports and evidence. Rather, after being presented with the deceptions and omissions in the government reports, when compared to the government's own raw publicly available evidence, the Ninth Circuit stated that "Favish, in fact, tenders evidence and argument which, if believed, would

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[64] OIC Pet. 15.

justify his doubts" about the government's conclusion of suicide in the park.[65]

Rather than holding the government reports and publicly available evidence irrelevant, the Ninth Circuit found that the reports and evidence were deficient enough to justify its statement that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[66] The OIC fails to disprove the Ninth Circuit's statement.

Moreover, the OIC's argument is based on the following statement:

> In this case, when five investigations in different branches of the federal government (including by the Office of Independent Counsel) have uniformly reached the same result, the contribution to public understanding that a *sixth* investigation by an unsatisfied private citizen can make is marginal at best.[67]

The OIC makes this statement as if the credibility of the government investigations is irrelevant. Under the OIC's view, it is difficult to see why there is any need for the FOIA at all because if the government has conducted several investigations, no matter how untrustworthy, the public has no need to see any of the hidden evidence.

The OIC's view is contrary to the purpose of the FOIA. According to this Court, the central purpose of the FOIA is to give ordinary citizens the power to keep the government

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[65] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[66] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[67] OIC Pet. 17.

honest in order to preserve our constitutional democracy.[68] This Court also has held:

> The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.[69]

Consistent with these holdings, the District of Columbia Circuit has discussed the nature of the public interest that could be served by disclosure of government investigative records:

> For example, the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.[70]

The number of government investigations is not as important as the demonstrable credibility, or lack of credibility, of those investigations. As established below, the government investigations are either not credible or were so limited as to be inappropriate to cite as support for the government's official conclusion.

3. The Fiske And Starr Reports On The Death Are Untrustworthy.

Permeating the OIC's and the intervenors' petitions is the assumption that the majority of the Ninth Circuit panel had no basis for holding that "Favish, in fact, tenders evidence and argument which, if believed, would justify his

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[68] *Department of Justice v. Reporters Committee*, 489 U.S. 749, 772-775, 103 L.Ed.2d 774 (1989).

[69] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L.Ed.2d 159, 178 (1978).

[70] *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984).

doubts" about the government's conclusion of suicide in the park.[71] That assumption is false. The Ninth Circuit majority had good reason to make its statement.

The OIC states that "Favish asserts that he needs the photographs to investigate his allegations of a government-wide conspiracy to cover-up the 'murder' of Foster."[72] The OIC's statement is false. Favish relies upon undisputed facts from the government's own underlying investigative record that do not prove to a certainty either murder or suicide in the park. However, when compared with the reports on the Foster case from Independent Counsels Robert Fiske and Kenneth Starr, those facts establish beyond question that both of those reports are not worthy of the public's trust.

The intervenors state that Favish is a "conspiracy theorist . . . ."[73] No matter how much the intervenors and the OIC argue that it is impossible for such a significant number of government officials and consultants to have produced such deceptive reports, the fact remains that they did, and that is the fundamental truth from which our analysis must begin.[74] The OIC stated: "Having examined, and rejected, all of Favish's specific factual assertions, at best Mr. Favish's assertion of 'public interest' in this case is based upon conspiracy theories and speculation of a mass governmental cover-up relating to Mr. Foster's suicide."[75] Although the OIC may have "rejected" all of Favish's specific factual assertions, it has not refuted them. Contrary to the OIC's statement, Favish's assertion of the public interest is not based exclusively on "conspiracy theories." Such

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[71] *Favish v. OIC*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[72] OIC Pet. 12.

[73] Intervenors' Pet. 2.

[74] It should be noted that it is not necessary for everybody involved in the Foster investigations to have deliberately deceived the public. In addition to those who act deliberately, shoddy work is done by people who are disinterested, lazy, or who are acting reasonably but who have been given incorrect or incomplete information from which to work.

[75] ER 474, 497.

conspiracies remain a possibility, especially because the OIC has failed to explain how the significant distortions and omissions in the Fiske and Starr reports were made.

The OIC states that privacy interests "cannot be trumped by such speculation of government wrongdoing or misconduct."[76] The word "speculation" implies that Favish has not shown any proof that the Fiske and Starr reports are untrustworthy and that there was government misconduct, either intentional or negligent. Contrary to the OIC's statement, the proof of at least negligent misconduct is overwhelming. As to whether any of the misconduct was intentional, there is plenty of circumstantial evidence to take that conclusion beyond the point of mere "speculation."

Moreover, the integrity of the federal court system is at stake because in addition to the public, the OIC misled the special three-judge panel that oversaw its Foster work and to whom Starr's OIC initially delivered its Foster report in 1997.

The Congressional "investigations" involving this death were so limited that they did not investigate the issue of whether Foster was murdered or committed suicide at the park.[77]

Starr failed to tell the public and the three-judge panel that the Park Police and a medical doctor at the death scene reported that they saw no blood spatter on the vegetation in the area that would have been behind Foster's head when he allegedly shot himself.[78]

Starr failed to tell the public and the three-judge panel that the first person officially to see Foster's deceased body and who testified that he did not see any gun in Foster's hand, also testified that the "gun in hand" photo did not depict what he saw.[79]

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[76] ER 474, 497.
[77] ER 602-609, 277, 288.
[78] ER 105, 109, 150, 153.
[79] ER 168-170, 178-179, 277, 358.

Starr and Fiske used an invalid gun identification.[80]

Fiske and Starr failed to tell the public and the three-judge panel that the Park Police Chief made a false statement about alleged identification of the gun.[81]

Fiske and Starr failed to tell the public and the three-judge panel that the medical report by the only doctor to examine Foster at the park reported a neck wound that officially did not exist and certified copies of his report are not the same and appear to have been improperly altered.[82]

Starr falsely implied that the Park Police observed the entire autopsy and Fiske and Starr failed to tell the public and the three-judge panel that before the Park Police arrived, Foster's tongue and soft palate were removed by the autopsy doctor who violated policy by beginning the autopsy before arrival of the police.[83]

Starr failed to tell the public and the three-judge panel that three of the four witnesses who allegedly saw Foster's car in the parking lot during a certain time period after he was dead, reported a car that was a different color than Foster's. Although he accurately reported that the fourth of these witnesses reported seeing a car of a different color than Foster's, Starr concluded that Foster's car was in the parking lot without explaining why all four of these witnesses were mistaken and reported the same color car—one that was a different color than Foster's car.[84]

Starr relied on Dr. Henry Lee's conclusion that Foster's clothes revealed no evidence that Foster's body had been dragged, without telling the public and the three-judge panel that this conclusion was worthless because the Park Police

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[80] ER 89, 92, 147-149, 156, 178-179, 277, 355, 362-363, 474, 488.
[81] ER 151, 152, 155, 156, 158, 474, 492.
[82] ER 44-47, 241-245, 277, 308-09, 311-312, 314-15, 600, 632-635, 643-650.
[83] ER 115, 117-18, 134-35, 154, 277, 309, 345.
[84] ER 57, 89-90, 105, 107-08, 124-26, 128, 130, 137-43, 154, 168, 172, 277, 299, 302, 307, 349, 350, 474, 496.

stated that they dragged Foster's body when it began to slide down the hill during an examination.[85]

Fiske and Starr failed to tell the public and the three-judge panel about an FBI memo to the Director of the FBI, written two days after the death, stating that the shot was fired into Foster's mouth without leaving an exit wound, thereby directly contradicting Starr, Fiske and the official autopsy report.[86]

Starr implied that the reason for the lack of readable x-rays of Foster is that the x-ray machine was not functioning properly. However, Starr failed to tell the public and the three-judge panel that the records show that the first service call for the x-ray machine was made more than *three months after* Foster's death.[87]

CONCLUSION

The intervenors' and the OIC's petitions should be denied.

Respectfully submitted.

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[85] ER 105, 109, 111, 146, 277, 332, 377, 474, 489.

[86] ER 277, 311-312, 314, 636-641.

[87] ER 356-57. These records were filed in August 2001 in the case entitled *Accuracy in Media, Inc. v. Office of Independent Counsel*, no. 99CV3448 (ESH) (D.D.C.). The invoices, an excerpt from the *Vaughn* index in that case and an authenticating declaration from AIM's attorney, were attached to Favish's opening brief to the Ninth Circuit in appeal no. 2 as an Addendum.

Supreme Court, U.S.
FILED
JAN 21 2003

No. 02-599

IN THE SUPREME COURT OF THE UNITED STATES

SHEILA FOSTER ANTHONY
AND LISA FOSTER MOODY,
Petitioners,

v.

ALLAN J. FAVISH, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In his response to the Foster family's petition for certiorari and in his petition for certiorari on behalf of the Office of Independent Counsel (No. 02-954), the Solicitor General rightly contends that the Ninth Circuit Court of Appeals decisions in this case conflict with decisions of this Court and other Circuits as to important issues regarding Exemption 7(C) of the Freedom of Information Act (5 U.S.C. § 552) ("FOIA"). However, the Solicitor General takes two positions with which we disagree.

1. The Solicitor General asks that the petitions for certiorari be held pending this Court's decision in *United States Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms v. City of Chicago*, No. 02-322 ("*ATF*"). We address this issue in our response to the Solicitor General's petition in No. 02-954, observing that *ATF* presents very different issues regarding the public interest aspect of FOIA Exemption 7(C) and does not concern in any way the issue of defining the scope of survivors' privacy rights presented in our petition.

2. The Solicitor General also argues that the court of appeals' decision contained no holding with respect to the scope of survivors' privacy rights and thus does not warrant review on that ground.[1] But the district court's decision was based on its interpretation of the court of appeals' previous

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[1] The Solicitor General previously took a different view of the Ninth Circuit's decision. In his Applications for a Further Extension of Time Within Which to File a Petition for A Writ of Certiorari, filed November 14 and December 17, 2002, the Solicitor General stated (at p. 5) that "by limiting the protected privacy interest to photographs that are 'graphic, explicit and extremely upsetting,' the court [of appeals] skewed the balance of interests against legitimate privacy interests."

decision as having "defined the zone of privacy protection as those photographs that are 'graphic, explicit, and extremely upsetting.'" Petition App. at 5; Brief for the Federal Respondent (No. 02-599) at 6. The court of appeals summarily affirmed the district court's judgment ordering release of four photographs, despite arguments by intervenors and the government that the court of appeals' previous decision had not adopted the test the district court applied.[2] In these circumstances, it is difficult to understand the court of appeals' decision other than to say that, if the "graphic, explicit, and extremely upsetting" test is not met, there is no recognizable survivors' privacy interest. As discussed previously,[3] the Ninth Circuit's position on this important issue (which likely will reoccur with increasing frequency) is contrary to that taken by the First, Third, Fifth, Sixth, Seventh, Tenth and D.C. Circuits, and also is at odds with this Court's decisions in *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), and *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982).

In any event, if the Court takes this case solely on the basis of the public interest issues, its decision may have no effect on the outcome. If, as the Ninth Circuit has apparently concluded, no privacy interest is implicated by the photographs it ordered to be released, it will not have to reach the public interest issues on remand. This is so because whether there is a public interest supporting disclosure of law enforcement records becomes relevant only

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[2] Opening Brief of Defendant-Appellee/Cross-Appellant, filed September 12, 2001, in Nos. 01-55487, 01-55788 and 01-55789, at pp. 18-19; Opening/Answering Brief of Defendants-In-Intervention, filed September 19, 2001 at pp. 13-14 ("serious misinterpretation of the Remand Order").

[3] Petition at 15-17.

where some privacy interest is invaded. 5 U.S.C. § 552 (b)(7)(C). If no privacy interest is invaded and no other exemption applies, the records must be released. *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989); *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988). Consequently, resolution of the public interest issues, as urged by the Solicitor General as well as the Foster family, ultimately will require consideration of the survivor privacy issue.

CONCLUSION

The petition for a writ of certiorari should be granted as to all issues, rather than held.

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MAR 31 2003

CLERK

No. 02-599

IN THE SUPREME COURT OF THE UNITED STATES

SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY,
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ALLAN J. FAVISH, ET AL.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF AND BRIEF IN REPLY TO BRIEF IN OPPOSITION OF ALLAN J. FAVISH

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PETITIONERS' SUPPLEMENTAL BRIEF AND BRIEF IN REPLY TO BRIEF IN OPPOSITION OF ALLAN J. FAVISH

Petitioners submit this supplemental and reply brief, pursuant to Rules 15.8 and 15.6, 1) to discuss the relevance of the Court's order in ATF v. City of Chicago, No. 02-322, issued February 26, 2003, after petitioners' last filing; and 2) to respond to the Brief in Opposition of respondent Allan J. Favish.

1. The Solicitor General, in briefs filed before the Court's last order in ATF v. City of Chicago, took the position that this petition and the petition the Solicitor General filed for the Office of Independent Counsel (No. 02-954) should be held pending final disposition of ATF v. City of Chicago. The Court's order of February 26, 2003 disposed of that case without reaching the merits. There is thus no more reason to hold this case pending disposition of ATF. The Solicitor General has concluded that this case presents important issues as to which certiorari is warranted. Given the removal of ATF as a possible vehicle for decision of some of these issues, certiorari should be granted here.

The Court also has before it Oguaju v. United States Marshals Service, No. 02-5651, which the Solicitor General also contended should be held pending final disposition of ATF v. City of Chicago. While Oguaju also involves FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), the issues and facts it involves are quite different from those in this case, in at least four significant respects.

First, in Oguaju the D.C. Circuit concluded that, even if the FOIA requester's speculations about the United States Attorney's failure to fulfill his Brady obligation were correct, producing documents involving that single act of misconduct

"would not serve the FOIA's purpose of showing 'what the Government is up to.'" Oguaju v. United States, 288 F.3d 448, 451 (D.C. Cir. 2002).[1] If a FOIA requester's allegations do not implicate FOIA's purpose, the question whether the court must weigh the credibility of those allegations as part of the balancing process under Exemption 7(C) is not reached. By contrast, that question must be reached in this case, because there is no doubt that, if Favish's allegations were credible (and they are not), production of records relevant to those allegations would serve FOIA's purpose. Thus the present case, unlike Oguaju, clearly presents the question whether the court must weigh the credibility of a FOIA requester's allegations before requiring public disclosure of records implicating privacy interests.

Second, because the death of Vince Foster was a matter of public interest, multiple investigations were held, and voluminous records of these investigations were made public. The question thus arises whether that fact should carry weight in the balancing judgment required by Exemption 7(C).[2] That question does not arise in Oguaju, because there was no investigation of the United States Attorney's discharge of his Brady obligations in that case.

Third, Oguaju never got to the stage of identifying specific records, and the courts below did not order

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[1] See also Antonelli v. F.B.I., 721 F.2d 615, 619 (7th Cir. 1983) ("The contention that 'the public shares Antonelli's interest in ensuring that his convictions were not obtained as a result of a violation of the Constitution' . . . is insufficient [to overcome privacy interests under FOIA]."); Hale v. U.S. Dep't of Justice, 973 F.2d 894, 900 (10th Cir. 1992) ("public interest in the fairness of a *particular* trial is not the kind of public interest that compels disclosure under FOIA") (emphasis in original), vacated on other grounds, 509 U.S. 918 (1993).

[2] The Solicitor General's Petition addresses this issue. Petition for Certiorari, No. 02-954, at 15-18.

disclosure of any records. Thus the question of the need to show that the specific records requested are relevant to the asserted public interest never arose. By contrast, in this case the courts below did order the production of specific photographs, despite the lack of a finding of any nexus between these photographs and the asserted public interest. Thus the question of the need for such a nexus is presented here.

Finally, the D.C. Circuit noted that the privacy interest involved in Oguaju is "slight." Oguaju v. United States, 288 F.3d at 451. By contrast, the survivors' privacy interest in the present case derives from the intense and deep-seated emotion that is involved in any family's remembrance of a loved one who met a violent and unexpected death. Unfortunately, this privacy interest is likely to arise all too often in the future as the well-publicized disasters of modern life lead to investigations that in turn become the target of FOIA requests seeking images of violence and death. The questions presented by this case are of great public interest and need to be settled by this Court.

2. Favish admits that the D.C. Circuit adopted a different standard than the Ninth Circuit regarding how a FOIA requester's allegations of public interest are to be weighed under Exemption 7(C). He argues only that the D.C. Circuit was too strict in requiring "compelling" evidence of "misconduct." Brief in Opp. at 2-4. However, the existence of conflict as to such an important issue is sufficient reason for certiorari. Moreover, the D.C. Circuit was surely right that "[w]hen multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports . . . does [not] suggest that the congressional or independent counsel inquiries got anything wrong regarding

Foster's wounds." Accuracy in Media, Inc. v. National Park Service, 194 F.3d 120, 124 (D.C. Cir. 1999). The D.C. Circuit concluded that these purported inconsistencies not only were not "compelling" evidence, they were not even "persuasive" evidence that the investigators reported false results. Id. The Ninth Circuit's decision to the contrary will open the door to routine invasions of survivors' privacy whenever FOIA requesters make allegations of wrongdoing based on the kind of inconsistencies that are inevitable in complex investigations involving numerous witnesses and investigators.

3. Favish argues that the multiple investigations of Foster's death were properly disregarded by the court of appeals, because he believes they were all untrustworthy. Brief in Opp. at 19-20. However, Favish's accusations of falsification and cover-up, incredible as they are with respect to only one investigation, become even more so when extended to the five investigations that have already occurred. That factor, as well as the extensive public disclosures that already have taken place in connection with these investigations, is surely relevant to the balancing judgment that Exemption 7(C) requires when public disclosure of records implicating privacy interests is sought.

4. Favish argues that the factual question of whether there was a nexus between the photographs and the asserted public interest is not appropriate for certiorari. Brief in Opp. at 5-6. But neither the Ninth Circuit nor the district court made a finding on that issue, even though the parties and the dissenting judge raised it. The Court need not make a factual finding itself; it need only recognize that the courts below failed to do so, in contrast to what other courts of appeals have required. Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574,

588 (D.C. Cir. 1987); Hale v. United States Dep't of Justice, supra, 973 F.2d at 900.

Moreover, even Favish's explication of his claimed nexus depends, in the case of two photographs the courts below ordered disclosed, on whether they show "blood that pooled" and "blood flow patterns" on the corpse. Brief in Opp. at 12, 13. That illustrates perfectly the D.C. Circuit's observation, quoted by the dissenting judge below, that "'we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic.'" Pet. App. at 25 (quoting Accuracy in Media, 194 F.3d at 125). In short, even under the Ninth Circuit's own test -- allowing disclosure of photographs that are not "graphic, explicit, and extremely upsetting" (Pet. App. at 17) -- there would be no nexus between the asserted public interest and the photographs disclosed by that court. The Ninth Circuit not only has failed to address the nexus issue, but has ordered disclosure of photographs that, under the terms of its own test, could not have any nexus to the public interest that Favish asserts.

5. Favish admits that the Ninth Circuit adopted the "graphic, explicit, and extremely upsetting" test as the standard for determining whether survivors' privacy interests are invaded but contends, inexplicably, that it adopted that test for this case only. Brief in Opp. at 13-14. Favish does not bother to defend this test on its merits. It is, indeed, indefensible, and there is no reason to believe the Ninth Circuit will not apply it in future cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

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